Supreme C
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No. 031595 MAY 2
OFFICE

IN THE
Supreme Court of the United States

EMPLOYERS INSURANCE OF WAUSAU
A MUTUAL COMPANY,

Petitioner,

v.

EL BANCO DE SEGUROS DEL ESTADO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a court, in the name of "interpretation" or "clarification," alter the substance of an arbitration award after that award has been judicially confirmed and enforced?

2. Does the *res judicata* doctrine prevent a party from contesting its obligations under a judicially-confirmed arbitration award when that party has already litigated those obligations to final judgment in a separate action?

RULE 29. 6 STATEMENT

All of petitioner's stock is owned by Employers Insurance of Wausau Mutual Holding Company which, in turn, is wholly owned by Liberty Mutual Holding Company, Inc.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. at 1a-9a) is reported at 357 F.3d 666 (7th Cir. 2004). The opinion of the district court (App. at 11a-16a) is unreported.[1] The court of appeals' earlier opinion in this case (App. at 43a-61a) is reported at 199 F.3d 937 (7th Cir. 1999). The district court's initial opinion (App. at 62a-78a) is unreported.

JURISDICTION

The court of appeals entered judgment on February 3, 2004. A timely petition for rehearing was denied on February 25, 2004 (App. at 10a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant parts of the Federal Arbitration Act, 9 U.S.C. §§ 9, 10, 11 and 12, are reproduced at pp. 79a-81a of the Appendix.

STATEMENT OF THE CASE

This case presents important questions regarding the authority of courts to review, and then alter, arbitration awards once those awards have already been judicially confirmed and enforced. The court below, under the auspices of "interpretation," changed the substance of an arbitration award eight years after it had been issued, five

[1] The district court issued several subsequent amendments to that opinion, which are reproduced at App. 17a-22a.

years after it had been confirmed, and two years after it had been enforced. In effect, that "interpretation" rewrote the award and one of its remedies, eliminating a letter of credit obligation required not only by the confirmed award itself, but also by a final judgment in a related, yet independent action.

Neither the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, nor this Court's relevant arbitration decisions contemplate late-stage, post-confirmation judicial interference with arbitration awards. The precedent established by the court below offers support and encouragement to those who would turn arbitration away from its intended purpose and into a prelude to never-ending litigation. Moreover, the court's decision exacerbated a pre-existing circuit split regarding the appropriate method for resolving ambiguities in an arbitration award both *prior* to judicial confirmation and *after* an award has already been confirmed.

Although this Court has staked out a very limited role for the judiciary in reviewing arbitration awards, it has not yet established when, if at all, courts may "interpret" or "clarify" arbitration awards themselves, and when they must leave that work to arbitrators. Nor has this Court determined whether, once an arbitration award has been confirmed, there is any further room for "interpretation" or "clarification" of that award.

Accordingly, further review is necessary to specify more precisely the circumstances under which courts, through "interpretation" or "clarification," may modify arbitration awards after they have already been judicially confirmed and enforced. Given the increasingly critical role

of arbitration as a method of dispute resolution, Supreme Court guidance on this issue is essential.[2]

A. Supreme Court Precedent Concerning Judicial Review Of Arbitration Awards.

Judicial scrutiny of arbitration awards is extremely narrow. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 41 n.4 (1991); *see also Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960). Courts are not permitted to analyze the merits of arbitrators' decisions, or to substitute their own judgment for that of the arbitrators. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987); *Enterprise Wheel*, 363 U.S. at 596. Similarly, courts should not entertain claims of factual or legal error by an arbitrator as an appellate court might in reviewing a lower court decision. *See Misco*, 484 U.S. at 38. Likewise, courts

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[2] "One of the foremost trends in corporate America in recent years has been the shift from traditional litigation and agency resolution of disputes toward the use of alternative dispute resolution (ADR)." David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. Pa. J. Lab & Emp. L. 133, 134 (Spring 1998). In a late 1990s study of over 600 Fortune-1000 companies, eighty percent reported using arbitration as a method of dispute resolution at least once in the past three years. *Id.* at 137. The use of arbitration has only increased in the intervening years. In an article in the *Boston Business Journal*, a senior vice president of the American Arbitration Association stated: "If I had to guess, I would say that arbitration has been written into literally millions and millions of contracts." Linda Goodspeed, *Litigation's Rising Price Tag Boosts Arbitration's Appeal*, Boston Business Journal, October 4, 2002, *at* http://boston.bizjournals.com/boston/stories/2002/10/07/focus3.html. Furthermore, the number of cases filed with the American Arbitration Association has increased from 60,808 in 1990 to 218,032 in 2001. *Id.*

have no authority to disagree with the remedy or relief chosen by arbitrators. *Id.*

Limited judicial review serves an important goal of the FAA. It fosters and respects arbitration agreements, in which parties have agreed that arbitration, not judicial resolution, will be the method for resolving their disputes. As this Court has explained:

> . . . a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute (say, as here, its obligations under a contract). But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances.

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995).

Indeed, this Court's arbitration decisions aim to give effect to the parties' contractual agreement to arbitrate. *See Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 2402, 2408 (2003); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995), *citing Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)("the central purpose of the Federal Arbitration Act [is] to ensure 'that private agreements to arbitrate are enforced according to their terms.'"); *Misco*, 484 U.S. at 36-37. Courts should not interject themselves into this private dispute resolution process by reviewing the merits of an arbitration award. *Kaplan*, 514 U.S. at 948; *Garvey*, 532 U.S. at 509.

B. The Federal Arbitration Act's Limits On Judicial Review Of Arbitration Awards.

Like this Court, Congress has recognized that arbitration awards are not to be second-guessed by the judiciary. The FAA anticipates that courts will confirm arbitration awards, turning final arbitration awards into judgments of the court. Nonetheless, the FAA allows courts to vacate, modify or correct awards under certain limited circumstances. 9 U.S.C. §§ 9-11 (App. at 79a-81a). For example, a court may vacate an award procured by corruption or fraud, or may modify or correct an award that contains an evident material mistake. *Id.* Consistent with this limited scope of judicial review, the FAA gives parties only three months after an award is issued to ask a court to vacate, modify or correct it. 9 U.S.C. § 12 (App. at 81a).

These congressional restrictions on judicial oversight of arbitration awards dovetail with another purpose of arbitration: to permit the swift and inexpensive resolution of contractual disputes by avoiding the expense and delay of litigation. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-123 (2001); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985)("[b]y agreeing to arbitrate . . . [a party] trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."). Limited judicial review of awards promotes prompt disposition by discouraging automatic appeal; it thereby honors the contractual dispute resolution mechanism for which the parties have bargained. *See Misco*, 484 U.S. at 36-37; *Enterprise Wheel*, 363 U.S. at 599 ("[i]t is the arbitrator's construction which was bargained for; . . . the courts have no business overruling him because their interpretation of the contract is different from his."); *see generally Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-220 (1985)

(FAA's basic purpose is to "ensure judicial enforcement of privately made agreements to arbitrate").

C. The Circuit Split.

When an arbitration award does not contain an evident material mistake, but is nonetheless ambiguous, the circuit courts generally agree that, at least prior to judicial confirmation, the award should be remanded to the arbitrators for clarification; judges should not try to resolve the ambiguity.[3] "[R]emand for clarification . . . is consistent

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[3] *Fradella v. Petricca*, 183 F.3d 17, 20 (1st Cir. 1999) (a district court can "remand an ambiguous arbitral award for clarification"); *Hyle v. Doctor's Assocs., Inc.*, 198 F.3d 368, 371 (2d Cir. 1999) (when there is an ambiguity in an arbitration award, the district court should remand to the arbitrator to clarify the award); *Colonial Penn Ins. Co. v. The Omaha Indemnity Co.*, 943 F.2d 327, 334 (3d Cir. 1991) ("courts have uniformly stated that a remand to the arbitration panel is appropriate in cases where the award is ambiguous"); *Cannelton Indus., Inc. v. District 17, United Mine Workers of America*, 951 F.2d 591, 594 (4th Cir. 1991) (when an award is ambiguous, "the court may remand the case to the arbitrator for clarification."); *Brown v. Witco Corp.*, 340 F.3d 209, 216 (5th Cir. 2003) (a "court may not interpret the award in order to resolve the ambiguity and implement the award; instead, the court must remand the award to the arbitrator with instructions to clarify the award's particular ambiguities."); *Sterling China Co. v. Glass, Molders, Pottery, Plastics & Allied Workers, Local No. 24*, 357 F.3d 546, 553 (6th Cir. 2004) ("if an arbitration award is ambiguous and in need of clarification, courts are made to remand back to the arbitrator to clarify its meaning and intent."); *Domino Group, Inc. v. Charlie Parker Memorial Foundation*, 985 F.2d 417 (8th Cir. 1993) (district court properly remanded case to arbitrator for clarification of an ambiguous arbitration award); *McClatchy Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 734 n.1 (9th Cir. 1982) ("[r]emand to an arbitrator for clarification and interpretation is not unusual in judicial enforcement proceedings."); *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 780 n.4 (11th Cir. 1993) ("A remand for clarification is proper only when the award itself can be interpreted in a variety of ways."); *Sargent v. Paine Webber Jackson & Curtis, Inc.*, 882 F.2d 529, 533 (D.C. Cir. 1989) (recognizing remand to the arbitrator for clarification of an award's meaning).

with the policy of judicial restraint that is the thrust of federal arbitral jurisprudence because it gives the arbitrator the opportunity to clarify an award with respect to which an ambiguity has arisen rather than forcing the court to interpolate its own estimate of the arbitrator's intent." *Official & Prof'l Employees Int'l Union, Local No. 471 v. Brownsville Gen. Hosp.*, 186 F.3d 326, 332 (3d Cir. 1999).

Despite agreeing with this basic proposition, the Seventh Circuit considers remand for clarification to be a "disfavored procedure." *Tri-State Bus. Machs., Inc. v. Lanier Worldwide, Inc.*, 221 F.3d 1015, 1017 (7th Cir. 2000)(citations omitted). Moreover, the Seventh Circuit, unlike any other circuit, allows district courts to "interpret and enforce an ambiguous award if the ambiguity can be resolved from the record." *Id.* (citation omitted); *see also Flender Corp. v. Techna-Quip Co.*, 953 F.2d 273, 279 (7th Cir. 1992); *Teamsters Local No. 579 v. B&M Transit, Inc.*, 882 F.2d 274, 278 (7th Cir. 1989); *Ethyl Corp. v. USW*, 768 F.2d 180, 188 (7th Cir. 1985).

The Seventh Circuit's rule, allowing courts to interpret ambiguous arbitration awards when the ambiguity can supposedly be resolved from the record, was inconsistent with the majority rule even before this case. That court's willingness to venture into "interpretation" of arbitration awards has brought it far closer to reviewing the merits of arbitral decisions than any other circuit court. With the decision below, however, the Seventh Circuit has set itself even further apart from the majority by holding that courts, including appellate courts, may interpret and clarify arbitration awards *after* the award has already been confirmed and enforced. The only other circuit to address "clarification" in a post-confirmation setting found that clarification should be performed by the arbitrators, not by the court. *See M&C Corp. v. Erwin Behr GmbH & Co.*, 326 F.3d 772 (6th Cir. 2003).

The Seventh Circuit's approach is improper, especially in a post-confirmation context. It allows far too much judicial interference with arbitration awards and, thus, with the dispute resolution method chosen by parties who have specifically agreed to arbitrate. It also creates too great a possibility that a court will substitute its judgment for that of the arbitrators. And, it places no limit on when a court may clarify an award, allowing that to happen years after confirmation and enforcement has taken place. The goal of finality, embodied in both the FAA and the *res judicata* doctrine, is cast aside. The Seventh Circuit's approach, in short, conflicts with the rules of the other circuits, the FAA and this Court's general jurisprudence. Accordingly, further review is necessary.

D. Background.

Between 1966 and 1973, petitioner Employers Insurance of Wausau A Mutual Company ("Wausau") entered into a series of excess retrocessional reinsurance "treaties" or "contracts" with more than 100 reinsurance underwriters. Respondent El Banco de Seguros del Estado ("Banco"), the state insurance bank of Uruguay, was one of those underwriters. The contracts obligated the underwriters or "retrocessionaires," including Banco, to reinsure Wausau for a specified percentage of direct reinsurance losses paid by Wausau. Each of the contracts included an agreement to arbitrate disputes.

A dispute arose and, in 1991, Wausau demanded arbitration. After four years of preliminary litigation, the arbitration commenced in the summer of 1995. In September 1995, Wausau obtained an arbitration award against Banco and a number of other reinsurers. (App. at 82a-84a). All of the reinsurers, except Banco, paid their respective shares of the approximately $7.8 million award

within 45 days, and were thereby released from further liability under the reinsurance contracts. Having failed to pay its $181,000 share within 45 days, however, Banco became subject to additional components of the arbitration award:

> If such amounts are not tendered by [the retrocessionaires], either individually or collectively, within 45 days of the date of this award, the Panel makes the following additional awards:
>
> 1) Interest from the date of this award at a compound annual rate of 7.5%;
>
> 2) Attorneys fees and costs of $930,730 for which [the retrocessionaires] are jointly and severally liable;
>
> 3) At the expiration of a period of 45 days following the date of this award, [the retrocessionaires] shall provide a Letter of Credit to Employers of Wausau in the amount of $9,000,000 in a form acceptable to the Wisconsin Insurance Department and to secure payment of the ultimate liability in this matter.

(App. at 84a).

In July 1998, after it had become obvious that Banco would not abide by the award, Wausau filed a petition to confirm that award in the United States District Court for the Western District of Wisconsin. That court entered a judgment confirming the award in January 1999 ("the January 1999 judgment"), rejecting Banco's arguments that it had not been given proper notice of the arbitration. (App.

at 62a-78a). The United States Court of Appeals for the Seventh Circuit affirmed in December 1999. *Employers Insurance v. Banco de Seguros del Estado*, 199 F.3d 937 (7th Cir. 1999) (App. at 43a-61). This Court denied Banco's petition for certiorari in June 2000. *See* 530 U.S. 1215 (2000). Banco never asserted, during any of these proceedings, that the arbitration award was ambiguous or in need of clarification.

Despite having lost at all stages of the judicial process, Banco refused to obey the judgment confirming the award: it did not pay the $181,000; it did not pay the applicable interest; it did not pay the applicable attorneys' fees; and it did not post the required letter of credit. Instead of complying, in June 2001, after Wausau had begun efforts to enforce the January 1999 judgment, Banco filed an action in the United States District Court for the Southern District of New York in an effort to obtain "clarification" of the arbitration award and the January 1999 judgment confirming it. (App. at 85a-94a). The New York federal court transferred the action to the Western District of Wisconsin, where Banco then raised the same arguments regarding the award and the January 1999 judgment that it later raised in this action. The Western District of Wisconsin rejected those arguments, dismissed the case and imposed sanctions on Banco for filing frivolous litigation. (App. at 25a-34a). Banco never appealed.

In August 2001, Wausau filed a motion with the Western District of Wisconsin asking for assistance in enforcing the January 1999 judgment and for sanctions against Banco for contempt of court. In September 2001, the district court granted Wausau's motion, instructed Banco to comply with its obligations under the arbitration award and judgment, and gave Banco "until September 30, 2001 to issue a $9 million letter of credit and pay all money due under the arbitration award and this order." (App. at 35a-

42a). Again, the district court rejected Banco's arguments regarding the requirements of the arbitration award and the January 1999 judgment confirming it.

Banco appealed the district court's September 2001 order. In March 2002, Banco finally took initial steps to comply with the district court's January 1999 judgment by paying Wausau approximately $1.5 million (comprising Banco's share of the original arbitration award, interest and attorneys' fees). That payment, however, came months after the September 30, 2001 deadline set by the district court, and only fulfilled part of Banco's obligations under the judgment. Banco still refused to post the $9 million letter of credit that both the judgment and the award required.[4]

In February 2003, the Seventh Circuit dismissed Banco's appeal in its entirety, sending the case back to the district court. (App. at 23a-24a). Shortly thereafter, in March 2003, Banco sent Wausau an arbitration demand, purporting to commence a new arbitration. In its demand, Banco asserted that its $1.5 million payment to Wausau satisfied its "ultimate liability" and that a new arbitration was needed because it no longer had to open any letter of credit. Noting that the district court had seen and decided that argument before, Wausau asked the district court to enjoin Banco from proceeding with a new arbitration. Wausau also asked the court to impose sanctions against Banco for its continued refusal to fully comply with the arbitration award and judgment confirming it. The district court granted Wausau's requested relief in April 2003. (App. at 11a-16a).

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[4] Banco's failure to post that letter of credit was also in violation of the Western District of Wisconsin's decision and judgment in the transferred New York action, which had also recognized the award's requirement that Banco post the $9 million letter of credit. (App. at 25a-34a).

Banco appealed, bringing the case before the Seventh Circuit for the third time.

E. The Decision Below.

On February 3, 2004, the Seventh Circuit upheld the district court's sanctions against Banco (App. at 1a-9a), finding that Banco's "impressive record of obstinacy" and its "seemingly irrational obduracy" were unacceptable. *See* App. at 5a, 8a. Despite upholding the sanctions, however, the court determined that Banco no longer had to post the $9 million letter of credit that the arbitrators had awarded Wausau as relief.

The Seventh Circuit opened its decision with a history of Banco's long-standing refusal to comply with the arbitration award and the district court's January 1999 judgment. The court pointed out that even after the district court had issued a writ of execution and Banco had finally acknowledged "that it owed Wausau $181,000, plus interest and attorney fees, Banco neither paid anything nor posted a letter of credit in any amount or on any terms." *Id.* at 3a.

After recounting Banco's repeated decisions to ignore what the arbitrators and the courts had ordered, the Seventh Circuit noted that it was far too late for Banco to seek "clarification" of the eight-year old award directly from the arbitration panel. Banco simply had "no legal basis for so belated a demand for clarification" from the arbitrators. *Id.* at 5a. "[T]he time to have sought arbitral clarification was when the award was issued, not eight years later." *Id.* The court also rejected, as far too late, Banco's request that the court remand the award to the arbitration panel. *Id.* at 6a. Banco had a "reasonable time" to make such a request, but eight years was "not a reasonable time." *Id.*

The court recognized that Banco's conduct "showed [that] Banco would never comply with the order to post the letter of credit unless subjected to the strongest possible penalty for civil contempt." *Id.* at 5a. Accordingly, the court upheld the district court's sanctions award, including attorneys' fees. It also upheld the district court's injunction prohibiting Banco from rearbitrating the award's letter of credit requirement, calling that maneuver a "frivolous demand for arbitration . . . ." *Id.*

Still, after all this, the Seventh Circuit revisited the terms of the award and determined, as Banco had argued, that Banco did not have to post the $9 million letter of credit. The court did this despite the fact that the letter of credit requirement had been reviewed and confirmed by the lower courts, including the Seventh Circuit itself, years before. *See* 199 F.3d 937 (7th Cir. 1999) (App. at 43a-61a).

The Seventh Circuit found that there was now "a legitimate disagreement" between Wausau and Banco over how the letter of credit might be used once Banco posted it. *See* App. at 5a. In the court's view, Banco was "asking for clarification at this late date" of whether the $9 million letter of credit was "just meant to secure Banco's existing liability to Wausau, or whether as Wausau [claimed] it secured future debts as well." *Id.* at 8a. Remarkably, the court determined that Banco's view "is the *correct interpretation*." *Id.* (emphasis added).

The Seventh Circuit's decision runs directly counter to the well-established reluctance of courts to meddle in the merits of arbitration awards, either before or after confirmation. Despite finding that it was too late for the arbitrators to clarify the award, the court did not consider it too late for it to revisit the award, and offer its own interpretation of what the arbitrators meant by the letter of credit remedy they awarded.

F. Petition for Rehearing.

Wausau filed a timely petition for rehearing, challenging the decision in several respects. It pointed out that the court had overlooked the fact that Banco had made the same arguments about the letter of credit on appeal as it had before the district court in the transferred New York action years earlier. In both instances, Banco had asked the court to dispense with the $9 million letter of credit once the monetary sums under the arbitration award were paid. In that independent action, however, the district court rejected Banco's arguments and left in place the award's requirement (as confirmed by the January 1999 judgment) that Banco post the $9 million letter of credit. Banco never took an appeal from that order. Because all of the elements of the *res judicata* doctrine had been met, Wausau argued that Banco could not raise those arguments again.

Wausau also suggested that the Seventh Circuit may have misunderstood the letter of credit requirement, because the court had explained in its decision that the requirement "was to secure the debt created by the award, not future, unrelated debts." *Id.* at 8a. Wausau noted that the issue actually before the district court was not what the letter was to secure, but whether Banco had an obligation to *post* the letter of credit. Wausau argued that there was no ambiguity about that. The separate issue of what obligations the letter of credit might be used to secure, once posted, was not addressed by the district court and, for that reason, Wausau argued that was not an issue properly before the court on appeal.

Yet, because the Seventh Circuit had chosen to consider and decide that issue, Wausau encouraged the court to be certain it understood that the arbitrators intended the letter of credit to secure the "ultimate liability." Wausau

explained that when the arbitrators awarded a letter of credit as security, they were considering all losses, past and future, that Wausau would be required to pay under the treaties. So, payment of Banco's share of the past losses contained in the award would not eliminate the need for security for future asbestos-related bodily injury losses for which Banco was liable under the treaties and award. Accordingly, Wausau asserted that those future losses, secured by the letter of credit, were "related" to the arbitration award in a very real sense.

In its various orders and judgments, the district court had enforced the award's letter of credit remedy as written, without delving into the question of how that letter of credit might be used once posted. For that reason, Wausau had developed no evidentiary record before the district court on what the letter of credit was meant to secure under the arbitration award. In its petition for rehearing, therefore, Wausau described what its arbitration record evidence would demonstrate. It asked the court for the opportunity to at least present that record to the district court so that the relevant evidence about the arbitration record could be considered. Wausau contended that if the Seventh Circuit were going to follow its rule allowing courts to "interpret" ambiguous awards based on "the record" of the arbitration, that record should at least be considered.

The court, without opinion, denied Wausau's petition for rehearing on February 25, 2004. (App. at 10a).

REASONS FOR GRANTING THE PETITION

The decision below expands a circuit conflict regarding the appropriate method for addressing ambiguous arbitration awards. All circuits considering the issue, other than the Seventh Circuit, require clarifications to be made by

the arbitrators that issued the award, not by courts later reviewing the award.

The Seventh Circuit, however, allows judicial clarification of an arbitration award both *prior* to judicial confirmation and enforcement and, as the decision below demonstrates, years *after* an award has already been confirmed and enforced. The Seventh Circuit's approach is decidedly contrary to this Court's jurisprudence on arbitration, out-of-step with the other circuits, and in contrast to the goals of the FAA. It gives far too little weight to the parties' contractual choice of arbitration as their dispute resolution remedy. It jeopardizes the finality that attaches to all confirmed arbitration awards once appellate review has been exhausted. And, it encourages those who disagree with the outcome of arbitration to turn to the courts for a new, more favorable decision-maker.

I. There Is A Need for Supreme Court Guidance On The Precise Timing And Circumstances Under Which An Arbitration Award May Be Judicially Clarified After That Award Has Already Been Confirmed And Enforced.

This Court has never addressed the appropriate standards for interpretation and clarification of arbitration awards. In a number of decisions, however, this Court has set out its general philosophy regarding arbitration. Those decisions emphasize the importance of judicial restraint when courts face challenges to, and attacks on, the merits of arbitral awards. Following that guidance, almost all federal circuit courts have determined that it is improper for the judiciary to meddle with arbitration awards by attempting to clarify those awards themselves. Instead, when an arbitration award is deemed ambiguous, nearly all the circuit courts, except the Seventh Circuit, require that award to be remanded to the arbitration panel for clarification.

The Seventh Circuit has adopted a different approach. Although it recognizes that district courts "generally may not interpret an ambiguous arbitration award" but should remand to the arbitrators for clarification, it "disfavors" remand and allows courts to "interpret and enforce an ambiguous award if the ambiguity can be resolved from the record." *See Flender Corp.*, 953 F.2d at 279-80; *see also Tri-State Bus. Machs.*, 221 F.3d at 1017. The Seventh Circuit's decision in the current case expands its ability to interpret ambiguous awards and presents future parties with a distinct, and entirely inappropriate, incentive to pursue continuing rounds of litigation in hopes of overturning or modifying an adverse arbitration award.

When courts attempt to resolve ambiguities, they place themselves in a role that belongs more appropriately to arbitrators. What arbitrators intended and what certain provisions in an award actually mean are for arbitrators to decide. Allowing courts to resolve ambiguities creates too great a risk that courts will substitute their own views for those of arbitrators. When that happens, parties who bargained for a non-judicial resolution of their disputes are deprived of the dispute resolution forum they specifically chose.

A. The Seventh Circuit's Approach Is At Odds With The Law Of The Other Circuits As Well As The Policies Underlying The Finality Of Arbitration Awards.

The circuit courts are virtually uniform in their views with respect to the resolution of ambiguous arbitration awards. *See supra* note 3. A court "may not interpret the award in order to resolve the ambiguity and implement the award." *Witco*, 340 F.3d at 216. Instead, the appropriate method for resolving an ambiguity -- embraced by the vast

majority of the circuit courts -- is to remand the award to the arbitrator with instructions to clarify the award's particular ambiguities. *See supra* note 3.

Judicial interpretation of an arbitration award usurps the parties' contractual agreement to have their disputes determined in an arbitral, as opposed to a judicial, forum. *See Bazzle*, 123 S. Ct. at 2407-2408; *Mastrobuono,* 514 U.S. at 53-54; *Misco*, 484 U.S. at 36-37. A remand "avoids the court's misinterpretation of the award and is therefore more likely to give the parties the award for which they bargained." *Colonial Penn*, 943 F.2d at 334; *see also Enterprise Wheel*, 363 U.S. at 599; *Brown v. Coleman Co.,* 220 F.3d 1180, 1183 (10th Cir. 2000) (the parties "contracted for the arbitrator's construction of the contract not a judge's construction.").

Despite the virtually unanimous view of the other federal circuit courts, the Seventh Circuit follows a different path. According to the Seventh Circuit, remand of an ambiguous arbitration award is a "disfavored procedure." *Flender Corp.*, 953 F.2d at 280. Remand should be avoided, the Seventh Circuit maintains, because of the "interest in prompt and final arbitration." *Ethyl Corp.*, 768 F.2d at 188.[5]

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[5] Other circuit courts, like the Seventh Circuit, recognize that the goal of achieving prompt arbitration decisions is consistent with the policy and purpose of the FAA. *See, e.g., Island Creek Coal Sales Co. v. Gainesville*, 764 F.2d 437, 441 (6th Cir. 1985) (to "require federal courts to remand for clarification or correction every arbitration award disputed by one of the parties" when brought to the court for enforcement "would make for an expensive and tedious process, directly opposite to the purpose of arbitration.") Still, the Seventh Circuit is the only court to stretch that principle to the degree it has in this case, allowing "interpretation" to clarify an award, without regard to the record developed before the arbitrators, even years after judicial confirmation of the award.

Thus, if an ambiguity in an award can be "resolved from the record," a court is free to interpret and enforce that award. *Flender Corp.*, 953 F.2d at 280; *Tri-State Bus. Machs.*, 221 F.3d at 1017.

Under Seventh Circuit jurisprudence, the arbitration "record" that courts can and should review in clarifying an award includes: the original grievance or complaint; the arguments and positions taken during the arbitration proceedings; all evidence and exhibits presented at the hearing; and the actual transcript of those arbitration proceedings, including any statements by the arbitrator. *Tri-State Bus. Machs.*, 221 F.3d 1015; *Flender Corp.*, 953 F.2d 273; *United Food & Commercial Workers Local 100A v. John Hofmeister & Son, Inc.*, 950 F.2d 1340 (7th Cir. 1991); *B&M Transit*, 882 F.2d 274; *Ethyl Corp.*, 768 F.2d 180. Basically, all documents and all testimony that were before the arbitrators become fair game for judicial review in resolving an ambiguity in an award.

A district court, under the Seventh Circuit's rule, takes on the attributes of an appellate court, reviewing the same materials and the same evidence that the arbitration panel examined. After conducting that review, the district court decides what the arbitrators intended or meant by their award.

The Seventh Circuit's rule puts the court perilously close to – if not into – the forbidden territory of reviewing the *merits* of an arbitration award. This is not how judicial review of arbitration awards is supposed to work. *See Misco*, 484 U.S. at 36 ("courts play only a limited role when asked to review" an award and "are not authorized to reconsider the merits of an award"); *Garvey*, 532 U.S. 509 (courts have "no business" reviewing the merits of an arbitration award).

While the Seventh Circuit may be correct that it is sometimes faster for courts to resolve ambiguities than it is for arbitrators, speed should not be the predominant consideration motivating the law on this subject. Indeed, this Court has previously recognized that "the basic objective in this area is not to resolve disputes in the quickest manner possible . . . but to ensure that commercial arbitration agreements, like other contracts, 'are enforced according to their terms' . . . and according to the intentions of the parties . . . ." *Kaplan*, 514 U.S. at 947 (citations omitted); *see also Dean Witter Reynolds*, 470 U.S. at 221 (the Court was "not persuaded . . . that the conflict between two goals of the Arbitration Act – enforcement of private agreements and encouragement of efficient and speedy dispute resolution – must be resolved in favor of the latter"). A rush to judgment results in the arbitrators who issued the award not being afforded the opportunity to explain what they meant all along. In short, judicial interpretation or clarification of ambiguous arbitration awards is generally inappropriate.

There is a reason that the FAA provides courts with only a narrow opportunity to "modify" or "correct" arbitration awards. 9 U.S.C. § 11. Congress recognized that courts should not be interfering in arbitral decision-making unless the arbitrators have made an evident miscalculation or mistake, or issued a decision on a matter not before them. *Id.; Diapulse Corp. of America v. Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir. 1980) ("judicial intervention into the arbitral process is precisely what the narrowly defined provisions of sections 10 and 11 [of the FAA] were designed to prevent."). In essence, Congress recognized that unless the arbitrators made an obvious blunder, courts should leave their decisions intact.

The Seventh Circuit's approach runs directly counter to the principles embodied in the FAA and in this Court's jurisprudence. Although the Seventh Circuit may consider

that courts are capable of deciding which ambiguities can be resolved by them and which should be resolved by the arbitrators, that is a troublesome choice to leave to the courts. Courts may very well think they know exactly what the arbitrators meant in an award when the arbitrators themselves had something entirely different in mind. Remand to the arbitrators for clarification poses a more prudent approach when a court faces an ambiguous award, and one that is more true to the goals of arbitration.

And when, as in this case, a court resolves a purported ambiguity *after* the award has already been judicially confirmed and enforced, the prospect of judicial interference with the award and resulting damage to the arbitration remedy is even greater. Because of its late-stage clarification, the decision at issue treats a judicially-confirmed award, which has become final through exhaustion of appellate remedies, as fair game for new challenge. This, in turn, creates incentives for parties to attack arbitration awards that have already been confirmed as final judgments, thereby turning arbitration into a mere prelude to additional rounds of litigation.

B. The Late-Stage Clarification Of The Award At Issue Presents An Appropriate Circumstance For This Court To Develop Rules Governing Clarification Of Awards.

Clarification of ambiguous arbitration awards typically occurs before the awards are judicially confirmed. Indeed, that is when clarification, if necessary, *should* occur. Courts should not confirm ambiguous awards, but rather should attempt to have any ambiguities resolved before confirmation. *See, e.g., Bell Aerospace Co. Div. of Textron, Inc. v. International Union, United Auto., etc.*, 500 F.2d 921, 923 (2d Cir. 1974) ("[c]ourts will not enforce an award that is incomplete, ambiguous, or contradictory."); *Witco*, 340

F.3d at 220 n.12 ("in an action to confirm or enforce an arbitration award, the court itself must determine whether the arbitration award is ambiguous and decide what must be clarified by the arbitrator on remand."). Accordingly, most federal circuits attempt to resolve any ambiguities – by a remand to the arbitrator – *before* confirming or enforcing an arbitration award.

Early resolution of ambiguities is consistent with the FAA's approach to correcting evident arbitral mistakes. A party that wants a court to correct a mistake in an arbitration award has only three months to request that correction. 9 U.S.C. § 12. According to the decision below, parties are not limited to that three-month timeframe for seeking clarification from arbitrators of an ambiguous award, and need only file their motion within a reasonable time. *See* 357 F.3d at 670 (App. at 6a).

The goal of early resolution of ambiguities is consistent with one of the overall goals of arbitration: to resolve disputes promptly and finally, with limited expense. As the Seventh Circuit recognized in this case, waiting eight years after an award is issued before seeking clarification of an alleged ambiguity is simply too long. *Id.* When that kind of delay occurs, the system and rules promoting prompt and final disposition are turned on their head.

Though it had the opportunity, Banco never asked that the award be clarified when the district court originally confirmed it, or later when the Seventh Circuit affirmed that confirmation. Nor did it ask for clarification when Wausau commenced enforcement, seeking a writ of execution. Nonetheless, after years of delay by Banco, the Seventh Circuit still went ahead and, at Banco's request, addressed an alleged ambiguity that Banco had finally found in the award. The court clarified that purported ambiguity five years after the award was confirmed and two years after it was enforced.

The situation faced by the Seventh Circuit in this case, involving a late-stage request for arbitral clarification, is not unique. The Seventh Circuit faced arguments regarding the meaning of a previously-confirmed award in *Tri-State Bus. Machs.*, 221 F.3d 1015, although the dispute there arose within three months after confirmation of the award as opposed to the years that passed here before clarification was sought.

As in the pre-confirmation context, the Seventh Circuit's approach to clarification of judicially-confirmed awards is distinctly different from other circuit courts, as well as in contrast to this Court's respect for the goals and purposes of arbitration. For example, in *M&C Corp v. Erwin Behr GmbH & Co.*, 326 F.3d 772 (6th Cir. 2003), the Sixth Circuit recognized that although the relevant arbitration award had already been confirmed and enforced, it still could potentially be remanded to the original arbitration panel for clarification of an ambiguity.[6] Thus, even in a post-confirmation context, the Sixth Circuit explained that "for a court to engage in guesswork as to the meaning and application of an ambiguous arbitration award is inconsistent not only with federal policy, but also with the parties' own agreement to submit their dispute to arbitration." *Id.* at 782.

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[6] In *M&C Corp.*, the question that the district court remanded to the original arbitrators for clarification concerned the calculation of commissions under a portion of an earlier confirmed award. Even though that earlier confirmed award had been partially performed by Behr, and the district court was in the process of determining "whether Behr had satisfied the judgment when it encountered an ambiguity in the award," the Sixth Circuit still was willing to permit remand to the arbitrators. 326 F.3d at 781. The court of appeals required the district court to identify precisely what the ambiguity was so that it could determine "whether the circumstances are appropriate for a remand to the arbitrator." *Id.* at 783.

M&C Corp. is significant because it is in direct contrast to the decision below regarding how post-confirmation requests for clarification should be treated. The Sixth Circuit's approach demonstrates judicial deference to the arbitrator's sole responsibility for resolving any ambiguity in an arbitration award, regardless of the lateness of the request. In contrast, when faced with a post-confirmation clarification request, the Seventh Circuit here chose to identify the issue for interpretation itself, without the assistance of the district court and without examination of the arbitration record -- and to resolve that issue as well. Its approach conflicts, not only with the Sixth Circuit's view, but also with the FAA and with judicial deference to the arbitral process. Moreover, it undermines all notions of finality inherent in any judicially-confirmed arbitration award.

The circumstances present here -- which directly illustrate the problems of late-stage judicial clarification of arbitral awards -- provide this Court with a sound backdrop to address issues that its current decisions have not yet resolved.

II. The Decision Below Is Incorrect.

With its decision in this case, the Seventh Circuit extended its approach to ambiguous arbitration awards well beyond any acceptable stopping point. While there is little reason for courts to resolve ambiguities in arbitration awards shortly after they are issued, there should be no authority for them to do so long after those awards have been judicially confirmed.

A. The Seventh Circuit Erred By "Clarifying" An Arbitration Award Without An Evidentiary Record Eight Years After It Was Issued, Five Years After It Was Judicially Confirmed And Two Years After It Was Judicially Enforced.

By taking into its own hands the decision regarding what certain key terms in the award actually meant, the Seventh Circuit invested itself with a power that it should not have. Once the award had been confirmed and Banco had exhausted its appellate rights, it was simply too late for any interpretation of purported ambiguities in the arbitration award. The confirmed award represented a final judgment that should not have been subject to collateral attack by Banco.

After deciding that it was too late for Banco to either ask the arbitrators directly to clarify the award or to ask the court to remand the award to the arbitrators for clarification, the court of appeals nonetheless took up the very ambiguity that Banco wanted resolved. Thus, although it was too late for clarification from the arbitrators, it was not too late for clarification from the court.

The Seventh Circuit did not directly acknowledge that it was clarifying the award. Instead, after explaining why Banco was too late with its requests for clarification, it explained that there was a "remaining question" regarding what the letter of credit was intended to secure. 357 F.3d at 671 (App. at 7a). But that "remaining question" was precisely what Banco wanted clarified. Furthermore, the court presented both parties' competing views on the issue and recognized that there was "a legitimate disagreement." *Id.* at 670 (App. at 5a). Despite acknowledging this purported ambiguity, the court went on to resolve the parties' competing views on that issue, announcing the "correct interpretation" of the award. *Id.* at 670-671 (App. at 7a, 8a).

In effect, the court took the resolution of an allegedly ambiguous award into its own hands.

The question that the Seventh Circuit addressed and decided concerned the $9 million letter of credit. The arbitration award specifically required that reinsurers not paying their monetary share of the award within 45 days after it was issued had to post a $9 million letter of credit. Because Banco did not pay its monetary share within 45 days of the award, it was clear that it had to post a $9 million letter of credit. Every court that had looked at the award up to the time of the decision below had said exactly that.

Banco argued, however, that because it had paid its monetary share of the award (albeit years after the 45-day period had expired) it should no longer have to post the letter of credit. Rather than requiring Banco to follow the award and actually post that letter of credit and then argue about how the letter of credit might be used, the court of appeals simply relieved Banco of its obligation to post the letter of credit. Before Banco had ever posted the letter of credit, the court eliminated it as a remedy available to Wausau under the award.

That was inappropriate. The Seventh Circuit did not enforce the terms of the arbitration award -- an award whose confirmation it had earlier affirmed. Instead, it usurped the arbitrators' authority, altered the terms of the award and undermined the chosen remedy of the parties -- a decision from an arbitration panel, not a court. In essence, the Seventh Circuit rewrote the arbitration award based on its own views of what the arbitrators intended.

The Seventh Circuit's approach undermines the goal of finality served and protected by the *res judicata* doctrine. It also undermines the goal of prompt and final dispute resolution normally achieved through arbitration. This

Court's decisions directly protect and foster these goals when arbitration is chosen as a contractual remedy. By allowing opportunities for post-confirmation judicial clarification of awards, the Seventh Circuit has created an obvious incentive to shop for a new forum or decision-maker, encouraging end-runs around arbitration, and the limited judicial review afforded under the FAA and this Court's guiding case law. It also creates an incentive to delay performance, as Banco did in this case. Banco's prize for its delay here was a judicial resolution of an issue which, if timely raised under the FAA, would have been decided by the arbitrators many years ago. Banco's belated requests for clarification should have been denied outright by the Seventh Circuit.

The arbitration award became final, and beyond challenge, once confirmed by the district court, affirmed by the Seventh Circuit, and after certiorari was denied by this Court in June 2000. Nonetheless, rather than following the express terms of the confirmed award (i.e. requiring Banco to post the letter of credit), the Seventh Circuit entertained Banco's belated arguments about what the arbitrators intended the letter of credit to secure.

It is always a problem for a court to be interpreting and clarifying an award instead of an arbitration panel. It was even more of a problem here because the Seventh Circuit conducted its interpretation without the benefit of the arbitration record. The Seventh Circuit reached its decision based solely on the arbitration award itself. The court did not know what arguments the parties had made to, or what relief they had requested from, the arbitrators. That evidence is critical to any determination of what the arbitrators intended when they granted relief to Wausau and ordered the posting of a letter of credit "to secure payment of the ultimate liability in this matter." (App. at 84a).

Yet Wausau had never presented any evidence from the arbitration record because it never understood that issue to be before the district court. When Wausau, on petition for rehearing, asked for permission to present that evidence, the Seventh Circuit denied its request. If the court had allowed Wausau to do so, Wausau would have introduced ample evidence to demonstrate the purpose of the letter of credit.[7] Then, at least the Seventh Circuit would have been in a better position to follow its rule allowing it to resolve alleged ambiguities through review of the arbitration record.

B. By Dispensing With The Arbitration Award's Letter Of Credit Obligation, The Seventh Circuit Overlooked The *Res Judicata* Effect Of Banco's Previous Challenge To That Same Obligation.

In late June 2001, Banco commenced a new and separate action for declaratory relief before the U.S. District Court for the Southern District of New York.[8] In its complaint for declaratory relief in that action, Banco alleged, among other things, that the district court's January 1999 judgment "confirmed an arbitration award which is

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[7] Had the court of appeals considered evidence from the arbitration record, it would have been apparent that the letter of credit requested by Wausau was intended to provide economic protection against additional delays in payment by the reinsurers, who had not paid any of the losses submitted to them prior to the arbitration. In short, the letter of credit was a vehicle to shift the economic leverage from the reinsurers to Wausau, and to give Wausau security for future losses that would arise under the treaties and for which the reinsurers, like Banco, would bear responsibility.

[8] That action was later transferred to the Western District of Wisconsin, which granted Wausau's summary judgment motion and dismissed the case. The court determined that the suit was frivolous and sanctioned Banco.

ambiguous. . . ."; Banco sought a "construction of the judgment/arbitration award" and asked for a declaratory judgment construing "the district court judgment and the arbitration award and fixing the amount of Banco's liability thereunder to defendant Wausau." (App. at 85a-94a, ¶¶ 8, 10; App. at 25a-34a).

In the New York action, Banco made the same argument it later made before the Seventh Circuit in this appeal. It contended that once it paid the monetary amounts set forth in the arbitration award, it was no longer required to post the $9 million dollar letter of credit. The district court, in deference to the arbitration award, rejected that argument, refusing to relieve Banco of its obligation to post the $9 million dollar letter of credit. (App. at 25a-34a). A judgment was entered and Banco never appealed.

The doctrine of *res judicata* limits a party's right to raise the same argument more than once. *See Montana v. United States,* 440 U.S. 147, 153-154 (1979). The three requirements for *res judicata* are: (1) an identity of the parties or their privies; (2) an identity of the causes of action; and (3) a final judgment on the merits. *See Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 327 n.5 (1979). Wausau argued before the Seventh Circuit that the *res judicata* doctrine barred Banco from contesting the issue of whether it must post the letter of credit. Nonetheless, the Seventh Circuit still addressed that issue and absolved Banco from doing exactly what the district court's judgment in the New York action refused to absolve Banco from doing -- posting a $9 million letter of credit.

Banco had its opportunity to argue for clarification of the award and the judgment confirming it. It did so and lost. It never appealed from the district court's judgment in the New York action. When it was permitted to relitigate these same issues again before the Seventh Circuit, the promise of

arbitration, as well as the remedy afforded through that promise, was broken. The Seventh Circuit's decision disserves the arbitration process and the judicial system and will encourage others who have agreed to arbitration to pursue round after round of litigation in the hope of avoiding unfavorable arbitration decisions.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Dated: May 24, 2004.

Respectfully submitted,

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 03-2484, 03-2771

EMPLOYERS INSURANCE OF WAUSAU,

Petitioner-Appellee,

v.

EL BANCO DE SEGUROS DEL ESTADO,

Respondent-Appellant.

Appeals from the United States District Court
for the Western District of Wisconsin.
No. 98 C 521—**Barbara B. Crabb**, *Chief Judge.*

ARGUED JANUARY 5, 2004—DECIDED FEBRUARY 3, 2004

Before POSNER, KANNE, AND ROVNER, *Circuit Judges.*

POSNER, *Circuit Judge.* The procedurally intricate litigation that has culminated in these twin appeals arises from a dispute between the parties to several contracts of reinsurance. Back in the 1960s and 1970s, Employers Insurance of Wausau had reinsured, with a number of insurance companies including an instrumentality of the Uruguayan government called El Banco de Seguros del Estado ("state insurance bank"), insurance obligations of Wausau. Wausau sustained losses from claims arising out of asbestos-related illness that it tried to offload on to the reinsurers. They resisted. Wausau demanded arbitration

pursuant to the reinsurance contracts, and in 1995 an arbitration panel awarded Wausau some $7.8 million, of which Banco's share was $181,000. The award, confirmed by a Wisconsin state court in *In re Employers Ins. of Wausau*, 552 N.W.2d 420 (Wis. App. 1996), provided that reinsurers—expressly including Banco—who failed to pay the award within 45 days would have to "provide a Letter of Credit to Employers of Wausau in the amount of $9,000,000 in a form acceptable to the Wisconsin Insurance Department and to secure payment of the ultimate liability in this matter." All the reinsurers paid within 45 days except Banco, which neither paid nor posted a letter of credit. Years passed and in 1998 Wausau petitioned the district court in the Western District of Wisconsin to confirm the award against Banco, which, although both named in the state-court confirmation proceeding as a defendant and served, had not appealed or otherwise participated in that proceeding yet claimed not to be bound by the judgment in it. It is unclear why Wausau sought relief in federal district court for Banco's defiance rather than instituting contempt proceedings in the state court. But Banco does not challenge the propriety of Wausau's choice of forum and there is no doubt that the federal court had jurisdiction under the treaties concerning disputes over arbitration with foreign entities. 9 U.S.C. §§ 203, 302.

Banco defended in the district court on the ground that it had not received proper notice of the arbitration. The district court rejected the defense and confirmed the award, and we affirmed. 199 F.3d 937 (7th Cir. 1999). Banco refused to comply with the award even after the judge issued a writ of execution, and so Wausau instituted a further postjudgment proceeding. In response, Banco acknowledged its obligation to pay the $181,000 plus interest and attorneys' fees, which had also been part of the award. But it refused to post the $9 million letter of credit on the ground that all that the arbitrators back in 1995 had required it to do was to post a

letter of credit to secure the payment of so much of the award as remained unpaid, so that once Banco paid what it owed no purpose would be served by the posting of a letter of credit except to secure Wausau against future debts of Banco to it that might arise from the reinsurance contracts. Yet while acknowledging that it owed Wausau $181,000 plus interest and attorneys' fees, Banco neither paid anything nor posted a letter of credit in any amount or on any terms.

Rejecting Banco's argument, the district court in September of 2001 ordered Banco to post the $9 million letter of credit and pay the award, including interest and attorneys' fees. Banco appealed, but we dismissed the appeal on the ground that the district court's order was neither a final judgment nor an injunction. A motion to hold Banco in contempt remained pending in the district court, and while the order to post a letter of credit was an interlocutory injunction, it was not immediately appealable under 28 U.S.C. § 1292(a)(1) because it merely reiterated the previous injunction, which we had affirmed, commanding Banco to post the letter of credit. *Gautreaux v. Chicago Housing Authority*, 178 F.3d 951, 956-58 (7th Cir. 1999). Meanwhile, however, Banco had finally admitted defeat to the extent of paying Wausau $1.5 million, which included the $181,000 awarded by the arbitrators, the interest and attorneys' fees also awarded by the arbitrators, plus attorneys' fees incurred by Wausau subsequent to the arbitration, although the payment of interest fell short by $16,000 (eventually it was paid, however). But Banco still refused to post the letter of credit.

Shortly afterwards the district court socked Banco with another $50,500 in sanctions to punish it for a suit it had brought in a federal district court in New York that had been transferred to the Western District of Wisconsin. In it Banco had sought an interpretation of the arbitrators' award that would have excused it from having to post the letter of

credit. It had sued in New York because Wausau had filed the judgment that it had obtained in the Western District of Wisconsin there believing Banco might have assets in New York that it could levy on to satisfy the judgment it had obtained in the Western District. The filing of the judgment in New York did not justify Banco's mounting what amounted to a collateral attack on the Western District's judgment. The circumstances in which collateral attacks are permitted in civil matters are circumscribed, see Fed. R. Civ. P. 60(b), and were never present in this case. Had Wausau tried to levy on the judgment in New York, Banco could have resisted on various grounds, such as that the amount of the judgment was incorrectly shown on the papers filed by Wausau (it was) or that Banco had no assets in New York that Wausau would be entitled to levy on. Banco did not do this; probably Wausau had given up on trying to collect anything in New York.

A year after the transfer of Banco's frivolous New York lawsuit back to the Western District of Wisconsin, and even though the district court's judgment requiring the posting of a letter of credit had already become final by virtue of our having affirmed it, Banco demanded that Wausau arbitrate the issue whether Banco was required to post a letter of credit. Wausau responded by asking the district court to enjoin arbitration and impose sanctions for Banco's continued refusal to post the letter of credit. It was thereby seeking postjudgment relief to protect the earlier judgment that it had obtained from the district court, requiring the posting of the letter of credit, from being undone. E.g., *Resolution Trust Corp. v. Ruggiero*, 994 F.2d 1221, 1224 (7th Cir. 1993); *EEOC v. Gurnee Inns, Inc.*, 956 F.2d 146, 148 (7th Cir. 1992); *Webb v. Ada County*, 195 F.3d 524, 526 (9th Cir. 1999). The district court issued the injunction and also imposed civil contempt sanctions for disobeying the order to post the letter of credit, ordering Banco to pay the court $2,000 a day, rising in stages to $4,000 on May 16,

2003, until Banco complied with that order, and to pay Wausau an additional $240,000 in attorneys' fees incurred in efforts to obtain the relief that the district court had ordered earlier. The clock continues to tick. Banco, which could have limited its liability to $181,000 in 1995, has already paid more than $1.5 million and if we affirm the sanctions and the additional attorneys' fees ordered will owe in excess of $1 million more. No doubt it has also incurred very substantial attorneys' fees of its own over the past eight years; a modest guess would be $500,000. If this is right, Banco stands to lose more than 15 times the amount of its original liability to Wausau.

The appeals challenge the sanctions, the additional attorneys' fees, the injunction against arbitrating the dispute over Banco's duty to post a letter of credit, and the district court's order to post it. The issues are intertwined. The frivolous demand for arbitration, set against the backdrop of Banco's seemingly irrational obduracy throughout the eight years since the issuance of the arbitrators' award, showed that Banco would never comply with the order to post a letter of credit unless subjected to the strongest possible penalty for civil contempt. The basis of the demand for arbitration was the disagreement between the parties over whether, as Wausau believes, the arbitrators intended that any reinsurer who did not pay the arbitration award would have to issue an irrevocable letter of credit that Wausau could use to secure future debts that the reinsurer might owe Wausau under its reinsurance contracts, or whether as Banco contends the intention was just to require a letter of credit to secure payment of the arbitrators' award; in that event Banco's eventual satisfaction of the award discharged its duty to issue a letter of credit. That is a legitimate disagreement. Indeed, we think Banco has the better of the argument. But the time to have sought arbitral clarification was when the award was issued, not eight years later. There was no legal basis for so belated a demand for clarification.

It is true that although there is a three-month limit on motions to vacate, modify, or correct an arbitral award, 9 U.S.C. § 12, there is no fixed deadline for a motion to remand for purposes of obtaining a clarification of the award. *Hyle v. Doctor's Associates, Inc.*, 198 F.3d 368, 371 n. 1 (2d Cir. 1999); *United Steelworkers of America, Local 4839 v. New Idea Farm Equipment Corp.*, 917 F.2d 964, 968 (6th Cir. 1990). But when no deadline for filing a motion or other pleading is specified, the inference is not that the motion can be filed at any time before the Day of Judgment, but that it must be filed within a reasonable time. Eight years is not a reasonable time. It is a separate question what the deadline is for requesting clarification from the original arbitrators directly, as distinct from asking a court to remand the case to the arbitrators. The former deadline "is essentially a matter of contract between the parties," *Brown v. Witco Corp.*, 340 F.3d 209, 218 n. 8 (5th Cir. 2003), but if there is no applicable contractual term, again a reasonable time is the default rule. *Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union, AFL-CIO, CLC, Local 182B v. Excelsior Foundry Co.*, 56 F.3d 844, 848 (7th Cir. 1995); *Brown v. Witco Corp.*, *supra*, 340 F.3d at 219; cf. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO, Local 631 v. Silver State Disposal Service, Inc.*, 109 F.3d 1409, 1410, 1412 (9th Cir. 1997). Not only is eight years unreasonable (quite apart from the fact that one of the arbitrators has died), but we can't imagine a panel of arbitrators being willing to clarify an award after the award had been challenged in federal court and enforced, unless directed to do so by the court. See *Legion Ins. Co. v. VCW, Inc.*, 198 F.3d 718, 720 (8th Cir. 1999).

Alternatively, without seeking clarification Banco could have posted a $9 million letter of credit that by its terms would terminate when it paid the entire amount that it owed Wausau. That would have placed the burden on Wausau to

challenge the adequacy of the letter of credit. Banco didn't do that either.

The remaining question is whether Banco has in fact to issue an unconditional letter of credit. The tail of exposure created by its reinsurance contracts with Wausau is a long one because of the length of time that it takes asbestos claims to ripen. Wausau believes that before coverage ends, Banco may owe it more than $9 million, so it would very much like to have a letter of credit that would guarantee its being able to collect from Banco whatever money turns out to be due. And while letters of credit are sometimes used to secure debts that arose before the letter was issued, *In re Compton Corp.*, 831 F.2d 586, 594 (1987), modified on unrelated grounds, 835 F.2d 584 (5th Cir. 1988) (per curiam); *In re El Paso Refinery, LP*, 171 F.3d 249, 254 (5th Cir. 1999); *In re Air Conditioning, Inc.*, 845 F.2d 293, 296-97 and n. 3 (11th Cir. 1988), they are more commonly (*Transparent Products Corp. v. Paysaver Credit Union*, 864 F.2d 60, 63 (7th Cir. 1988)) used to secure future debts, as in *Tippecanoe Beverages, Inc. v. S.A. El Aguila Brewing Co.*, 833 F.2d 633, 636 (7th Cir. 1987); *Colonial Courts Apartment Co. v. Proc Associates, Inc.*, 57 F.3d 119, 123 (1st Cir. 1995), and *Chase Manhattan Bank v. Equibank*, 550 F.2d 882, 884-85 (3d Cir. 1977).

But we do not think the arbitrators' award in this case can sensibly be interpreted to require such a guaranty. Remember that the duty to post a letter of credit was imposed by the arbitrators in respect of their having imposed liability on the reinsurers for a past default, and that it was conditional on a reinsurer's failing to pay the money part of the arbitral award within 45 days. The implication (supported by the arbitrators' statement that the purpose of requiring the letter of credit was "to secure payment of the ultimate liability in *this* matter" (emphasis added)) is that the purpose of requiring a defaulting reinsurer to post a letter of

credit was to secure the debt created by the award, not future, unrelated debts. The judgment of the Wisconsin state court confirming the arbitrators' award also states that the purpose of the letter of credit is "to secure the amounts" that the reinsurers had been determined by the arbitrators to owe Wausau. So when Banco finally paid the award, it was no longer obligated by its terms to post a letter of credit. Of course it should have sought clarification of the matter at the outset, as we said. But as no court or arbitral panel has ever ruled on the scope of the obligation (it appears not to have been an issue in the state court proceeding), the failure to have sought clarification has not waived or forfeited Banco's right to an adjudication of the issue.

It might seem, though, that in asking for clarification at this late date Banco is trying once again to mount a collateral attack on the judgment of the district court, which required the posting of the letter of credit. But that court explicitly left open the question what the letter of credit means: whether it is just meant to secure Banco's existing liability to Wausau, or whether as Wausau claims it secures future debts as well. If the former, then since Banco has at last satisfied that liability, it has no obligation to post the letter of credit. The former is the correct interpretation. No purpose would be served by returning the case to the district court for the identical determination.

This ruling does not affect the accrued sanctions. Judicial orders must, unless stayed, be obeyed even when wrong. *Pasadena City Bd. of Education v. Spangler*, 427 U.S. 424, 439-40 (1976). Because of Banco's impressive record of obstinacy, moreover, we shall not lift the $4,000 a day sanction. When and if Banco pays the court and Wausau *all* moneys owing them, including all reasonable attorneys' fees incurred by Wausau in defending against Banco's appeal from the sanctions order and the denial of arbitration and in all subsequent proceedings in the district court

required to extract the moneys due from Banco, the daily sanction shall cease to accrue.

The judgment is vacated insofar as it orders the posting of a letter of credit but is otherwise affirmed, with costs of the appeal to be borne by the respondent. The case is returned to the district court for the limited purpose of assuring Banco's compliance with the judgment as modified in this opinion. Further obduracy by Banco will result in the imposition of additional sanctions that will make $4,000 a day seem like the touch of a feather.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

A true Copy:
Teste:

_____
Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

February 25, 2004

Before

Hon. Richard A.Posner, *Circuit Judge*

Hon. Michael S. Kanne, *Circuit Judge*

Hon. Ilana Diamond Rovner, *Circuit Judge*

Nos. 03-2484 & 03-2771

EMPLOYERS INSURANCE OF WAUSAU, a mutual company, Petitioner-Appellee,	Appeals from the United States District Court for the Western District of Wisconsin.
v.	No. 98 C 521
EL BANCO DE SEGUROS DEL ESTADO, Respondent-Appellant.	Barbara B. Crabb, *Chief Judge.*

ORDER

On consideration of the petition for rehearing filed on February 17, 2004 by petitioner-appellee. All of the judges on the panel have voted to deny the petition. The petition is therefore DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

EMPLOYERS INSURANCE OF
WAUSAU, A MUTUAL COMPANY,

ORDER

Petitioner,

98-C-0521-C

v.

EL BANCO DE SEGUROS DEL ESTADO,

Respondent.

Petitioner Employers Insurance of Wausau has moved for a permanent injunction prohibiting respondent El Banco de Seguros del Estado from initiating arbitration over respondent's obligation to post a letter of credit in petitioner's favor in the amount of $9,000,000. A hearing was held on the motion on April 23, 2003, before United States District Judge Barbara B. Crabb. Petitioner appeared by Timothy Muldowney and Kendall Harrison. Respondent appeared by James Higgins.

FACTS OF RECORD

Respondent has been litigating its obligation to post the letter of credit since 1998, when petitioner filed this action to enforce an arbitration award issued in September 1995. Petitioner prevailed in this court and in the court of appeals, after respondent appealed the enforcement order. The United States Supreme Court refused to hear the matter.

Despite the unanimity of the rulings against it, respondent continued to resist paying the amounts ordered by the arbitrators, refused to post the letter of credit and refused to disclose the existence of any assets upon which petitioner could levy. Petitioner learned of a bank account in New York and attempted to levy on it. Respondent brought a new action in the Southern District of New York in an effort to relitigate its obligation to conform to the arbitration award. This effort was thwarted when the new action was transferred to this court and decided against respondent in September 2001. Sanctions were imposed on respondent for its failure to pay petitioner and to post the letter of credit. Before the sanctions could take effect, respondent appealed the case to the Court of Appeals for the Seventh Circuit; that court dismissed the appeal in February 2003, for lack of jurisdiction.

On March 20, 2003, presumably upon receiving word of the dismissal of the appeal, respondent filed a demand for arbitration on respondent, notifying it that it viewed the 1995 arbitration award as disputed insofar as it ordered the posting of a letter of credit in the amount of $9,000,000. Petitioner then moved in this court for a temporary restraining order, which was granted after a hearing on April 16, 2003, to restrain respondent from proceeding with its arbitration request, pending the holding of a hearing on petitioner's motion for a permanent injunction.

In the earliest proceedings before this court, respondent argued that the letter of credit and other arbitration sanctions would be "grossly unfair and would work a terrible hardship." Resp.'s Br. in Reply, dkt. #18, at 19. In petitioning the court of appeals for a rehearing en banc after that court had affirmed this court's enforcement of the arbitration award, respondent told the court that a judgment had been entered "in excess of $10 Million Dollars." Kareken Aff., dkt. #44, Exh. 6, at 1. In its petition for a writ

of certiorari to the Supreme Court, respondent stated that the arbitration award would be enforceable as a judgment and would require "the posting of a $9,000,000 letter of credit in favor of [petitioner]."

In the hearing on the motion for a permanent injunction, respondent argued that arbitration was the only proper way of proceeding to resolve the parties' dispute over the purpose of posting the letter of credit. In a hearing to show cause why respondent should not be held in contempt for the filing and continued prosecution of its case against Wausau in the Southern District of New York, El Banco de Seguros v. Employers Ins. of Wausau, 01-C-0098-C (W.D. Wis.), respondent told the court that it had been entitled to file in the Southern District of New York because

> [u]nder Wisconsin law a party is entitled to go to a court to get a construction or interpretation of an ambiguous arbitration award, and that is WERC v. Teamsters Local No.563, 75 Wis. 2d 602, 250 N.W.2d 696, a 1977 case. That case authorizes or permits a party to go to court if from the record a court can construe an ambiguous arbitration award. We took the position that all a court would have to do, whether it would be this court or the court in New York, would be to look at the record in the arbitration proceeding and look at the award and construe the award based upon that.

Tr. of Hrg. on Mot. for Sanctions, at 9.

DISCUSSION

Respondent has shown no reason why petitioner's motion for a permanent injunction should not be granted. Respondent has had a full opportunity to arbitrate; it failed to take advantage of that opportunity or of its opportunity to

seek clarification or review of the arbitration within three months of the award. It has fought the enforcement of the award in four different courts, without success. Four different courts have devoted time and resources to hearing its defenses; it is time for this misuse of the judicial system to come to an end. Respondent should not be permitted to assert in a new forum the claims it has asserted in this case and in case no. 01-C-0098-C that have been decided against it.

It makes no sense for respondent to argue that any dispute remains with respect to its obligation to post a $9,000,000 bond for purposes other than to ensure its payment of the amount it owes respondent. Not only has this court that the purpose of the obligation to post the letter of credit is not simply to insure the payment of respondent's portion of the arbitration award, respondent has conceded in three courts its obligation to post a letter of credit that is not limited simply to securing payment of the award. If, as it now argues, it believes that the letter of credit was nothing more than security for its payment of $181,319, why would it think it would be liable for posting a $9,000,000 letter of credit once it had paid petitioner the $181,319 it owed? And, more to the point, why would it have told three courts that its liability would exceed $9,000,000 if it did not acknowledge that the requirement of posting of the letter of credit was in addition to the payment of $181,319?

It is too late for respondent to argue, or attempt to arbitrate, its obligation to post a letter of credit in the amount of $9,000,000. Under the terms of the arbitration award, it assumed this obligation when it failed to pay $181,319 as ordered by the arbitration panel and confirmed by the Circuit Court for Marathon County, Wisconsin in an order entered on October 24, 1995. It missed its opportunity to seek clarification of the award or review of it when it let the three-month period pass without saying anything. The courts have

told it repeatedly that its obligation is to post the letter of credit in the amount of $9,000,000.

Petitioner is entitled to a permanent injunction to prevent respondent from prosecuting yet another collateral attack on this court's judgments and orders. The doctrine of res judicata bars respondent from endless litigation of previously litigated matters.

Respondent's remarkable recalcitrance requires the imposition of sanctions, as well as an award of costs and attorney fees for the expenses petitioner has incurred since September 2001, in attempting to enforce its 1995 arbitration award. A federal court may impose such sanctions to coerce obedience to its orders. Connolly v. J.T. Ventures, 851 F.2d 930, 932 (7th Cir. 1988). Fed. R. Civ. P. 70 authorizes courts to adjudge a party in contempt for failure to perform a specific act required under a judgment. Although respondent characterizes the posting of the letter of credit as equivalent to a money judgment and therefore, not one for which it may be held in contempt for failing to fulfill, respondent is wrong.

ORDER

IT IS ORDERED that

1. Respondent El Banco del Seguros de Estado is ENJOINED PERMANENTLY from proceeding with any arbitration pursuant to its demand of March 20, 2003 and from initiating any future arbitration demand that concerns in any way respondent's obligations under the September 14, 1995 arbitration award or this court's judgments and orders relating to that award;

2. Respondent is to pay to the court sanctions pursuant to Fed. R. Civ. P. 70 in the amount of $2000 a day, running from and including March 11, 2003 (the day after this court received the court of appeals' decision on respondent's appeal), to May 1, 2003 and then in amounts increasing as follows: $3000 a day running from and including May 2, 2003 to May 15, 2003; and $4000 a day running from and including May 16, 2003, until it has paid petitioner Employers Insurance of Wausau all amounts owed, including attorney fees and costs and has posted a letter of credit in the amount of $9,000,000; once respondent has paid the amounts due petitioner and has posted the required letter of credit, it will be relieved of the obligation to pay future sanctions only; if the sanctions do not result in compliance, petitioner is free to ask the court to increase them.

3. Respondent is to pay reasonable attorney fees and costs to petitioner;

4. No later than April 30, 2003, petitioner is to file an itemized statement of attorney fees and costs incurred in this matter since September 21, 2001.

Entered this 23rd day of April, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EMPLOYERS INSURANCE OF
WAUSAU, A MUTUAL COMPANY,

Petitioner,

v.

EL BANCO DE SEGUROS
DEL ESTADO,

Respondent.

JUDGMENT IN A CIVIL CASE

Case No.
98-C-521-C

This action came for consideration before the court with District Judge BARBARA B. CRABB presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of petitioner Employers Insurance of Wausau:

1. PERMANENTLY ENJOINING respondent El Banco de Seguros del Estado from proceeding with any arbitration pursuant to its demand of March 20, 2003 and from initiating any future arbitration demand that concerns in any way respondent's obligations under the September 14, 1995 arbitration award or this court's judgments and orders relating to that award;

2. Respondent is to pay to the court sanctions pursuant to Fed. R. Civ. P. 70 in the amount of $2000 a day, running from and including March 11, 2003 to May 1, 2003 and then in amounts increasing as follows: $3000 a day running from and including May 2, 2003 to May 15, 2003; and $4000 a day running from and including May 16, 2003, until it has paid petitioner Employers Insurance of Wausau all amounts owed, including attorney fees and costs and has posted a letter of credit in the amount of $9,000,000; and

3. Respondent is to pay reasonable attorney fees and costs to petitioner.

Approved as to form this 25th day of April, 2003.

/s/ Barbara B. Crabb
BARBARA B. CRABB,
District Judge

/s/ Joseph W. Skupniewitz April 28, 2003
Joseph W. Skupniewitz, Clerk of Court

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EMPLOYERS INSURANCE OF
WAUSAU, A MUTUAL COMPANY,

Petitioner,

v.

EL BANCO DE SEGUROS
DEL ESTADO,

Respondent.

ORDER

Case No.
98-C-0521-C

The order entered herein on April 23, 2003, is amended in the following respects. In the third line from the bottom on page 4, the word "held" should be inserted after the word "court" and before the word "that." On page 6, the second to the last line of the first full paragraph is amended to show that the arbitration award was entered on September 18, 1995. The clerk of court is directed to prepare an amended judgment conforming to the amended order.

In all other respects, the order remains as entered on April 23, 2003.

Entered this 7th day of May, 2003.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY,

Petitioner,

v.

EL BANCO DE SEGUROS DEL ESTADO,

Respondent.

AMENDED JUDGMENT IN A CIVIL CASE

Case No. 98-C-0521-C

This action came for consideration before the court with District Judge BARBARA B. CRABB presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of petitioner Employers Insurance of Wausau:

1. PERMANENTLY ENJOINING respondent El Banco de Seguros del Estado from proceeding with any arbitration pursuant to its demand of March 20, 2003 and from initiating any future arbitration demand that concerns in any way respondent's obligations under the **September 18, 1995** arbitration award or this court's judgments and orders relating to that award:

2. Respondent is to pay to the court sanctions pursuant to Fed. R. Civ. P. 70 in the amount of $2000 a day, running from and including March 11, 2003 to May 1, 2003 and then in amounts increasing as follows: $3000 a day running from and including May 2, 2003 to May 15, 2003; and $4000 a day running from and including May 16, 2003, until it has paid petitioner Employers Insurance of Wausau all amounts owed, including attorney fees and costs and has posted a letter of credit in the amount of $9,000,000; and

3. Respondent is to pay reasonable attorney fees and costs to petitioner.

Approved as to form this 9th day of May, 2003.

/s/ Barbara B. Crabb
BARBARA B. CRABB,
District Judge

/s/ Joseph W. Skupniewitz 5-9-03
Joseph W. Skupniewitz, Clerk of Court Date

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EMPLOYERS INSURANCE OF
WAUSAU, A MUTUAL COMPANY,

Petitioner,

v.

EL BANCO DE SEGUROS
DEL ESTADO,

Respondent.

JUDGMENT
IN A CIVIL
CASE

Case No.
98-C-521-C

This action came for consideration before the court with District Judge BARBARA B. CRABB presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment is entered in favor of petitioner Employers Insurance of Wausau, A Mutual Company against respondent El Banco De Seguros Del Estado awarding attorney fees and costs in the amount of $239,708.60.

/s/ Joseph W. Skupniewitz
Joseph W. Skupniewitz, Clerk of Court

6-12-03
Date

APPENDIX H

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 14, 2003

Before
Hon. Richard D. Cudahy, *Circuit Judge*
Hon. Richard A. Posner, *Circuit Judge*
Hon. Michael S. Kanne, *Circuit Judge*

EMPLOYERS INSURANCE OF WAUSAU, Plaintiff-Appellee,	) Appeal from the) United States) District Court for the) Western District of
No. 01-3753 v.	) Wisconsin.)
EL BANCO DE SEGUROS DEL ESTADO, Defendant-Appellant.	) No. 98 C 521)) Barbara B. Crabb) Chief Judge

ORDER

On consideration of the Motion of Employers Insurance of Wausau a Mutual Company to Dismiss Appeal For Lack of Jurisdiction Pursuant to 28 U.S.C. § 1291 and the Response of El Banco de Seguros Del Estado to Employers Insurance of Wausau, a Mutual Company's Motion to Dismiss For Lack of Jurisdiction Pursuant to 28 U.S.C. § 1291, and review of the short record,

IT IS ORDERED that this appeal is DISMISSED for lack of jurisdiction. Both parties acknowledge that appellate

jurisdiction is inappropriate under 28 U.S.C. § 1291, and we agree. Further, contrary to the assertions of the parties, we do not have jurisdiction over defendant's appeal under 28 U.S.C. § 1292(a)(1). The order appealed cannot be characterized as one granting or denying injunctive relief.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EL BANCO DE SEGUROS
DEL ESTADO,

Plaintiff,

v.

EMPLOYERS INSURANCE
OF WAUSAU, A MUTUAL
COMPANY,

Defendant.

ORDER

01-C-0631-C

This is a civil suit for declaratory and injunctive relief brought originally in the United States District Court for the Southern District of New York. Plaintiff El Banco de Seguros del Estado seeks construction of an arbitration award, a determination of its obligations under the judgment, an order vacating both the transcript of judgment filed by defendant Employers Insurance and all restraining orders and information subpoenae filed under the transcript of judgment and an order enjoining any further enforcement of the judgment until plaintiff's obligations have been fixed by the court and then only to the extent of the liability fixed by the court.

The case is before the court on defendant's motion for summary judgment. Defendant contends that the suit filed in New York is nothing more than an attempted end run around this court's adverse rulings against plaintiff in an

earlier suit brought in this court, Employers Insurance of Wausau v. El Banco de Seguros del Estado, 98-C-0521-C. Defendant is correct: plaintiff is abusing the judicial processes of the United States by ignoring the orders and judgment that have been entered in 98-C-0521-C and trying to relitigate a closed case in another federal court.

Diversity jurisdiction is present. As a wholly owned instrumentality of the government of Uruguay, plaintiff is a foreign state for the purpose of determining diversity jurisdiction. 28 U.S.C. §§ 1332(a)(4), § 1603(a). Defendant Employers is a mutual insurance company, organized under the laws of the state of Wisconsin, with its principal place of business in Wausau, Wisconsin. Far more than $75,000 is in dispute.

From the findings of fact proposed by the parties, I find that the following are undisputed.

UNDISPUTED FACTS

On January 5, 1999, this court issued a decision, order and judgment in Employers Insurance of Wausau v. El Banco de Seguros del Estado, 98-C-0521-C, confirming an arbitration award that had been issued in September 1995 by a panel of arbitrators in favor of Employers Insurance of Wausau against a number of reinsurer respondents, including the plaintiff in this case, El Banco de Seguros del Estado. The arbitrators ordered all of the respondents including Banco, to pay Wausau $7,783,324. Banco's portion was $181,319. As an incentive for prompt payment, the arbitrators provided that any party that did not pay its share of the award within 45 days would be responsible for (1) interest from the date of the award at a compound rate of 7.5%; (2) attorney fees and costs of $930,730, for which the parties were jointly and severally responsible; and (3) a letter of credit to Wausau in the amount of $9,000,000 in a form

acceptable to the Wisconsin Department of Insurance to secure payment of the ultimate liability in this matter.

All of the respondents paid their portions of the arbitration award within the time specified by the award, except Banco. Until March 13, 2002, Banco had made no payment to Wausau in conformance with the arbitrator's award. On March 13, Wausau received a wire transfer from Banco in the amount of $1,528,969. Wausau does not agree that this wire transfer relieves Banco of its obligation to pay Wausau the full amount of the arbitration award (in excess of $1,528,969, according to Wausau) and to post the required letter of credit.

Judgment in favor of Wausau was entered in this court in 98-C-0521-C on January 5, 1999. Banco appealed to the Court of Appeals for the Seventh Circuit, which affirmed the judgment in all respects. Employers Insurance of Wausau v. Banco de Seguros del Estado, 199 F.3d 937 (7th Cir. 1999). Banco petitioned the United States Supreme Court for a writ of certiorari; its petition was denied on June 5, 2000. Meanwhile, on a number of occasions, Wausau asked for the payment of the award, but Banco refused.

Wausau served discovery requests on Banco, asking for information about its financial position and about any assets it held in this country. Banco objected to many of the requests and answered many interrogatories with the statement, "We have no knowledge of any [such assets or accounts] located in the U.S." On March 19, 2002, Wausau filed a motion for a writ of execution pursuant to 28 U.S.C. § 1610(c) and Fed. R. Civ. P. 69 in this court. When Banco failed to appear or file any response to the motion, the writ issued on March 27, 2001.

On January 10, 2001, Wausau docketed the writ of execution with the United States District Court for the

Southern District of New York and followed up by docketing a transcript of the judgment with the Clerk of the County of New York. The clerk of that court prepared a transcript of the judgment. The transcript states that the judgment against Banco was for $8,714,054. Wausau's New York counsel served restraining notices and information subpoenae on a number of entities in New York. Such information subpoenae are designed to gather information about a debtor's financial resources; they do not function as a restraint upon a recipient's ability to transfer funds or assets. Restraining notices have the effect of preventing transfer or alienation of any funds of the judgment debtor that are in the possession of the recipient of the restraining notice. Wausau included in the notices and subpoenae the erroneous information that the entire arbitration award remained unsatisfied, when in fact Banco was the only party to the arbitration award that had not paid its share of the award. When the error was brought to Wausau's attention, its counsel drafted amended restraining notices and information subpoenae and served them on all entities that should have received them.

Most of the entities served advised Wausau's counsel that they had no assets that were owed to Banco. However, counsel learned that Citibank, N.A. held money owing to Banco in two separate accounts, one of which had a balance of $1,078,073.90 and one of which held $52,960.02.

Wausau has not begun any proceeding seeking the turnover of any funds to satisfy the judgment or issued any execution or directive to any law enforcement officer or judgment enforcement officer in connection with the judgment.

On July 2, 2001, Banco filed an action for declaratory relief in the United States District Court for the Southern District of New York, seeking clarification of this court's

January 5, 1999 order. The district court transferred the action to this court on October 30, 2001.

In the meantime, on August 3, 2001, Wausau filed a motion in its original case in this court, 98-C-0521-C, seeking relief in aid of enforcement of judgment and writ of execution and asking for an order imposing sanctions for contempt of court pursuant to Fed. R. Civ. P. 1, 69 and 70. Banco responded by filing a notice of cross motion and cross motion to stay proceedings and alternatively for an order construing the January 5, 2001 order and fixing Banco's liability. In an order entered on August 27, 2001, the court advised the parties it would consider Banco's cross motion as "opposition" to Wausau's motion.

On September 13, 2001, an opinion and order issued, granting Wausau's motion for relief in aid of enforcement of judgment, denying Banco's motion to stay, specifying Banco's obligations under the award and judgment, ordering Banco to comply with such obligations by September 30, 2001, and instructing Banco to pay Wausau the attorney fees it had incurred in pursuing Banco's compliance since June 5, 2000, the date on which the United States Supreme Court had denied Banco's petition for a writ of certiorari. The order included the warning that if Banco defied the order, it would be in contempt of court and required to pay sanctions to Wausau in the amount of $2,000 a day.

On September 21, 2001, Wausau filed a statement of the attorney fees it had incurred from June 5, 2000 to September 19, 2001, in its attempts to enforce its judgment against Banco. Banco made no objection to the amount sought.

Starting in October 2001, Wausau tried to obtain an order from the court holding Banco in contempt. However, on October 12, 2001, Banco filed a notice of appeal of the

September 13, 2001 order. On October 19, 2001, the court issued two orders. In the first, Banco was ordered to pay Wausau $183,244.48 in attorney fees and costs for its post-June 2000 efforts to enforce its judgment; in the second, Wausau's motion for a finding of contempt was denied on the ground that Banco's notice of appeal had divested this court of jurisdiction to decide the matter. On November 8, 2001, Wausau filed an unopposed motion in the court of appeals, asking the court to dismiss the appeal because the order Banco appealed from was not final. The court of appeals has not acted on the motion.

OPINION

Banco has spent almost seven years trying to avoid paying its portion of an arbitration award entered in 1995 against it and a number of other reinsurers. Despite the fact of the arbitration award, this court's order enforcing the award and the court of appeals' affirmance of this court's order, it continues to refuse to comply with the entire order. Knowing that this court had ruled against it, it tried to file a new suit in federal court in New York, in part to challenge what it thought were inaccurate transcripts and associated information subpoenae and writs, but in larger part to obtain another construction of its obligations under the 1995 arbitration award. The New York court did not oblige Banco; it transferred the case to this court.

The law prohibits litigants like Banco from pursuing round after round of challenges to adverse rulings, through the doctrine of res judicata. "'The doctrine of res judicata (claim preclusion) requires litigants to join in a single suit all legal and remedial theories that concern a single transaction.'" Roboserve, Inc. v. Kato Kagaku Co., Ltd., 121 F.3d 1027, 1034 (7th Cir. 1997) (quoting Perkins v. Board of Trustees of the Univ. of Illinois, 116 F.3d 235, 236 (7th Cir. 1997)). Parties that fail to observe this rule are barred from

bringing additional suits to challenge claims that have been resolved or that could have been brought in the original suit. The doctrine protects opposing parties from the expense and vexation of multiple suits, conserves judicial resources and minimizes the possibility of inconsistent decisions.

For res judicata to apply to bar further litigation of a claim, three requirements must be met. First, there must be an identity of the causes of action. Second, there must be an identity of the parties. Third, there must be a final judgment on the merits. All three requirements are met in this case. In both this case and the case brought by Wausau, 98-C-0521-C, the cause of action was the arbitration award and its enforcement. The parties are identical in both cases and there was a final judgment on the merits in the earlier case.

Banco contends that "issues remain that were not decided by the Order of 9/13/01 [entered in 98-C-0521-C]." To the extent this is true, Banco has not explained why it did not move in this court for reconsideration of the September 13 order rather than file a new lawsuit in another federal court.

In any event, only one of the issues was not decided explicitly in the September 13 order. It is true that I did not say whether Wausau would be required to cancel its erroneous transcript showing a money judgment against Banco for $8 million and substitute a corrected one. It was implicit in the order that this request for relief was denied because judgment was entered for Wausau in all respects. To make it explicit, however, I am not persuaded of any need to require amendment of the transcripts. First, Banco has not shown that the transcript is in error; Wausau filed the arbitration judgment that recites an amount due of $8 million. Second, Wausau's attorneys have corrected all of the information subpoenae and restraining notices, which are the operative documents. There is no reason to believe that

the $8 million figure in the transcript would enable Wausau to collect more than the amount to which it is legally entitled. Wausau is not making any effort to do so and no court would permit such an effort.

The other issues that Banco wishes to raise concern the letter of credit the arbitrators required it to post. Banco wants to know whether "Wausau can seek to collect future claims under the arbitration award and judgment where the award states that it is a 'full and final settlement for losses' and the award provides for each reinsurer to receive a full release of claims under the contracts then before the arbitrators." Banco's Br. in Oppos., dkt. #9, at 12. As I have said in previous orders, Banco had three months under the Federal Arbitration Act in which to challenge the arbitration award. 9 U.S.C. § 12. When that time passed, Banco was barred from attacking the award.

Banco wants to know also whether it could dispense with the letter of credit if it satisfies the award in its entirety. Banco is attacking yet again the need for the letter of credit but the arbitration panel imposed that requirement, not this court. Even if I were to address the question, I would not do so when the matter remains hypothetical. Banco has not satisfied its obligations. It is no position to ask what will happen when it does.

As noted in the facts, Banco sent Employers $1,528,969 in March 2001. The sending of this money does not absolve Banco of its obligations. It is not yet clear whether this amount covers all of Banco's obligations to Employers, which include attorney fees incurred by Employers since June 5, 2000, as well as the arbitration award, interest on the award and $930,730 in attorney fees incurred during the arbitration proceeding. Moreover, Banco has not yet posted the letter of credit required of it under the arbitration award.

It is obvious that this suit was filed for no purpose other than to permit Banco to put off satisfying the obligations it incurred as a result of the arbitration proceedings. Courts take a dim view of frivolous lawsuits; they take a particularly dim view of frivolous efforts to delay compliance with an arbitration award. See, e.g., Flexible Manufacturing Systems v. Super Products Corp., 86 F.3d 96, 101 (7th Cir. 1996) ("'The promise of arbitration is spoiled if parties disappointed by its results can delay the conclusion of the proceeding by groundless litigation in the district court, followed by groundless appeal to [the appellate] court; we have said repeatedly that we would punish such tactics and we mean it.'") (quoting Hill v. Norfolk & Western Ry., 814 F.2d 1192, 1203 (7th Cir. 1997)); Widell v. Wolf, 43 F.3d 1150, 1151 (7th Cir. 1994) ("We have remarked before that awards of attorneys' fees are readily available when one side refuses to accept an arbitrator's award and loses"). This case is frivolous in two respects: it is clearly barred by the doctrine of res judicata and it is an ill-disguised effort to avoid the results of arbitration. Pursuant to Fed. R. Civ. P. 11, I will order Banco to show cause why it should not be found to have violated Rule 11(b)(1) by filing and pursuing this suit.

ORDER

IT IS ORDERED that the motion of defendant Employers Insurance of Wausau for summary judgment is GRANTED. This lawsuit is barred by the doctrine of res judicata. The clerk of court is directed to enter judgment in favor of Employers Insurance against plaintiff El Banco de Seguros del Estado. FURTHER, IT IS ORDERED that plaintiff El Banco de Seguros del Estado is to appear in Courtroom 250 on Friday, May 17, 2002, at 1:00 p.m., to show cause why it should not be sanctioned under Fed. R. Civ. P. 11 for filing this lawsuit. No later than May 15,

2002, defendant Employers Insurance is to file an itemized statement of the fees and costs it has incurred reasonably in defending this suit.

Entered this 30th day of April, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EMPLOYERS INSURANCE
OF WAUSAU, A MUTUAL
COMPANY,
Plaintiff,

OPINION
AND ORDER

v.

98-C-521-C

EL BANCO DE SEGUROS
DEL ESTADO,
Defendant.

This is a civil action in which plaintiff Employers Insurance of Wausau, A Mutual Company, has moved for relief in aid of enforcement of judgment and writ of execution of this court's January 5, 1999, judgment confirming an arbitration award against defendant El Banco de Seguros del Estado (the state bank of the Republic of Uruguay). Defendant responded to plaintiff's motion by filing a brief, a cross motion and a motion to stay proceedings on plaintiff's motion. In an order entered August 27, 2001, I advised the parties that defendant's cross motion would be considered nothing more than opposition to plaintiff's motion. Defendant seeks to stay proceedings on plaintiff's motion until the District Court for the Southern District of New York has heard its complaint for declaratory relief concerning its letter-of-credit liabilities under the arbitration award.

Plaintiff's motion for relief in aid of enforcement of judgment and writ of execution will be granted. Defendant's motion to stay proceedings will be denied. Defendant will

have until September 30, 2001, to (1) pay the arbitration award of $181,319 plus interest from the date of the award at a compound annual rate of 7.5%; (2) pay attorney fees and costs of $930,730 plus post-judgment interest at the statutory rate; (3) issue a letter of credit to the plaintiff in the amount of $9 million in a form acceptable to the Wisconsin Insurance Department; and (4) pay all plaintiff's attorney fees and costs incurred in collecting the judgment since June 5, 2000, the date the United States Supreme Court denied defendant's petition for review. Moreover, if defendant defies this order it will be held in contempt of court and will be required to pay sanctions to plaintiff in the amount of $2,000 a day for each day it remains in contempt of this order.

UNDISPUTED FACTS

Plaintiff Employers Insurance of Wausau is a mutual insurance company organized under the laws of the state of Wisconsin with its principal place of business in Wausau, Wisconsin. Defendant Banco de Seguros del Estado is the state bank of the Republic of Uruguay with its principal place of business in Montevideo, Uruguay.

Between 1966 and 1973, plaintiff entered into a series of excess retrocessional insurance "treaties" with underwriters, or retrocessionaires, at Lloyd's of London. In effect, the subject treaties obligated the retrocessionaires to pay plaintiff specified percentages of losses incurred by plaintiff that were within the coverage of the treaties. Defendant was one of these retrocessionaires.

A dispute arose regarding amounts due under the treaties for asbestos-related losses. The treaty contained a clause requiring arbitration of any dispute. An arbitration panel heard the dispute and issued its decision on September 18, 1995. The panel determined that plaintiff was entitled to

a total of $7,783,324 from the retrocessionaires. Of this amount, defendant's share is $181,319. Additionally, the panel's order provides:

> If such amounts are not tendered by [the retrocessionaires], either individually or collectively, within 45 days of the date of this award, the Panel makes the following additional awards:
>
> > 1) Interest from the date of this award at a compound annual rate of 7.5%;
> > 2) Attorneys fees and costs of $930,730 for which [the retrocessionaires] are jointly and severally liable;
> > 3) At the expiration of a period of 45 days following the date of this award, [the recessionaires] shall provide a Letter of Credit to Employers of Wausau in the amount of $9,000,000 in a form acceptable to the Wisconsin Insurance Department and to secure payment of the ultimate liability in this matter.

On January 5, 1999, this court entered judgment confirming the panel's arbitration award. On December 15, 1999, the United States Court of Appeals for the Seventh Circuit affirmed this court's judgment; it denied defendant's petition for rehearing en banc on January 19, 2000. On June 5, 2000, the United States Supreme Court denied defendant's petition for certiorari.

Defendant owes plaintiff approximately $1.7 million ($181,319, plus interest at 7.5% compounded annually from September 18, 1995, plus $930,730 in attorney fees and post-judgment interest).

OPINION

A. Arbitration Award: Letter of Credit

According to the arbitration award, defendant is required to issue a $9 million letter of credit because it failed to pay its designated share within the award's 45-day time frame. Under the Federal Arbitration Act, defendant had three months to challenge the arbitration award. 9 U.S.C. § 12. When that time expired without a challenge, it was barred from raising an attack on that award at a later date. See United Parcel Service, Inc. v. Mitchell, 451 U.S. 51, 63 n.5 (1981); Lander Company, Inc., v. MMP Investments, Inc., 107 F.3d 476, 478 (7th Cir. 1997) (noting that under the Act "if you fail to move to vacate an arbitration award you forfeit the right to oppose confirmation (enforcement) of the award if sought later by the other party"). Although its obligation to pay had become final three months after September 18, 1995, it never complied with the arbitration award. Instead, nearly three years later, on July 22, 1998, plaintiff had to file a complaint in this court petitioning for judicial confirmation of the arbitration award in order to collect the money due and obtain the $9 million letter of credit required under the award.

Defendant now argues that the letter-of-credit directive requires it only to post a letter of credit sufficient to secure its share of liability and not one to secure the full $9 million. Plaintiff asserts that defendant was well aware it would have to post the full $9 million if all other retrocessionaires paid the amount they owed and this is merely another stalling tactic to delay issuing the letter of credit. Plaintiff's reading of the arbitration award is a persuasive one. Clearly, the obligation was intended to force the parties to pay up quickly and thereby avoid the obligation. It would not have the desired effect if it were intended merely to secure each party's share of the liability. Defendant chose to stall; by

doing so, it assumed the full burden of the letter-of-credit obligation.

Curiously, defendant's current interpretation of the letter-of-credit provision runs counter to its previous arguments to this court and on appeal. For example, while contesting plaintiff's petition for confirmation of the arbitration award, defendant argued to this court that the letter of credit and other arbitration sanctions would be "grossly unfair and would work a terrible hardship." Dft's. Br. in Reply of Respondent's Mot. to Vacate Arbitration Award, dkt. #18, at 19. This argument was rejected on the ground that "the necessity for the letter of credit was a matter addressed at arbitration. Having failed to participate, [defendant] cannot question the conclusions of the panel." Defendant appealed this court's holding to the Court of Appeals for the Seventh Circuit, which affirmed the ruling. Defendant stated in its petition for rehearing en banc, which was denied, that a judgment had been entered "in excess of $10 Million Dollars." Kareken Aff., dkt. #44, Exh. 6, at 1. Defendant then petitioned for certiorari to the United States Supreme Court, stating specifically that the arbitration award "will be enforceable as a judgment" and would require "the posting of a $9,000,000 letter of credit in favor of [plaintiff]." Plt.'s Reply Br., dkt #43, at 13. Unquestionably, from its pleadings, defendant was aware that it would have to post a $9 million letter of credit if this court's judgment was not overturned. It is clear that after defendant's petition for certiorari was denied, defendant should have paid plaintiff the money due immediately and issued the $9 million letter of credit pursuant to the terms of the arbitration award and this court's judgment confirming that award. Its belated claim of ambiguity sounds hollow. Defendant is required to issue a $9 million letter of credit under the arbitration award. Therefore, I will grant plaintiff's motion for relief in aid of enforcement of judgment and writ of execution and deny defendant's motion to stay the proceedings.

B. Sanctions

Federal courts possess an inherent power to sanction parties for conduct that abuses the judicial process. Barnhill v. United States, 11 F.3d 1360, 1367 (7th Cir. 1993) (citing Chambers v. Nasco, Inc., 501 U.S. 32 (1991)). A court may impose sanctions either to coerce obedience to its order or to compensate the complainant. United States v. Slaughter, 900 F.2d 1119, 1125 (7th Cir. 1990); Connolly v. J.T. Ventures, 851 F.2d 930, 932 (7th Cir. 1988) (citing United States v. United Mine Workers of America, 330 U.S. 258, 303-04 (1947)). The court maintains broad discretion to set a contempt award "based on the nature of the harm and the probable effect of alternative sanctions." Connolly, 851 F.2d at 933. The complainant must establish a violation of the order by clear and convincing evidence. Stotler and Company v. Able, 870 F.2d 1158, 1163 (7th Cir. 1989) (citing United States v. Huebner, 752 F.2d 1235, 1241 (7th Cir. 1985)). In addition, Fed. R. Civ. P. 70 allows for contempt sanctions if a party fails to comply with a judgment. Stotler, 870 F.2d at 1164 (noting that "Rule 70 permits a court to find a party in contempt if he fails to honor a court's order").

Plaintiff requests sanctions for defendant's refusal to honor this court's judgment after all defendant's appeals had been exhausted. Contradicting its arguments to the Court of Appeals for the Seventh Circuit and Supreme Court, defendant contends that plaintiff has not made a case for sanctions because issuing the full $9 million letter of credit is not enforceable as a judgment. Defendant argues that its delay in satisfying this court's judgment has been caused by plaintiff's demands in excess of the arbitration award; namely, plaintiff's insistence on a letter of credit for the full $9 million. First, because defendant did not appeal the arbitration award within the three-month period as required

under the Federal Arbitration Act, it is time-barred from disputing it now. Second, defendant has already appealed the arbitration award and this court's judgment through the federal judicial system and has lost. When the Supreme Court denied certiorari, defendant should have realized the time for delay tactics had passed. Instead, it continued to stonewall plaintiff, allegedly giving false answers to interrogatories by stating that it had no assets in the United States, when in fact it had over $1.2 million at Citibank, N.A. in New York.

Because I find that plaintiff has demonstrated by clear and convincing evidence that defendant is abusing the judicial process and has defied this court's judgment, I will order defendant to pay all attorney fees and costs plaintiff has incurred in attempting to collect the judgment since June 5, 2000, the date on which the United States Supreme Court denied defendant's petition for review. Moreover, defendant will have until September 30, 2001, to issue a $9 million dollar letter of credit and pay all money due under the arbitration award and this order. If defendant fails to do so, it will be held in contempt of court and will be required to pay sanctions to the plaintiff in the amount of $2,000 a day until it complies with this order.

ORDER

IT IS ORDERED that

1. Plaintiff's motion for relief in aid of enforcement of judgment and writ of execution is GRANTED.

2. Defendant's motion to stay proceedings on plaintiff's motion for relief in aid of enforcement of judgment and writ of execution is DENIED;

3. Defendant has until September 30, 2001, to:

(a) pay the arbitration award of $181,319 plus interest from the date of the award at a compound annual rate of 7.5%;
(b) pay attorney fees and costs of $930,730 plus post-judgment interest at the statutory rate;
(c) issue a letter of credit in the amount of $9 million in a form acceptable to the Wisconsin Insurance Department; and
(d) pay all attorney fees and costs incurred by plaintiff in collecting the judgment since June 5, 2000.

4. No later than September 21, 2001, plaintiff is to submit an itemized accounting of the fees and costs it has incurred since June 5, 2000, in its effort to collect on the judgment it obtained against defendant.

5. If defendant defies this order, it will be in contempt of court and required to pay sanctions to plaintiff in the amount of $2,000 a day for each day it remains in contempt of this order.

Entered this 13th day of September, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge

APPENDIX K

In the
United States Court of Appeals
For the Seventh Circuit

No. 99-1304

Employers Insurance of Wausau,

Plaintiff-Appellee,

v.

Banco De Seguros Del Estado,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 98 C 521--Barbara B. Crabb, Judge.

Argued September 13, 1999--Decided December 15, 1999

Before Posner, Chief Judge, and Cudahy and Kanne, Circuit Judges.

Kanne, Circuit Judge. Banco De Seguros Del Estado ("Banco") was a member of a Lloyd's, London syndicate that reinsured several insurance policies underwritten by

Employers Insurance of Wausau ("Wausau"), a Wisconsin insurance company. In September 1995, an arbitration panel awarded Wausau $7,783,324 from the syndicate, of which Banco was liable for $181,319. When Wausau filed a petition in the district court to confirm the arbitration award against Banco, Banco moved to vacate, claiming that Wausau's service of notice of arbitration did not comply with the terms of their reinsurance contract or with the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. sec.sec. 1330, 1602-1611. The district court granted Wausau's motion to confirm and denied Banco's motion to vacate. Banco appeals, claiming that the district court made errors of law and fact in determining that notice of arbitration had been served properly on Banco. Finding no error, we affirm.

I. History

Banco is the state insurance bank and an instrumentality of the Sovereign Republic of Uruguay. Wausau is a mutual insurance company organized under Wisconsin law with its principal place of business in Wausau, Wisconsin. Between 1966 and 1973, Wausau entered into a series of contracts known as excess retrocessional insurance treaties ("Treaties") with more than 100 underwriters at Lloyd's, London and other London market insurance companies, including Banco, commonly referred to as the "retrocessionaires." Under the Treaties, the retrocessionaires agreed to reinsure Wausau for specified percentages of direct reinsurance losses paid by Wausau, as long as those losses were within the coverage of the Treaties.

The Treaties were identical to one another, except for the specific percentages of coverage allocated to a particular party under each one. Each Treaty contained an arbitration clause, which stated that any arbitration requested by the parties would take place in Wausau, Wisconsin. The arbitration clause did not specify what procedures would be

used in the event of an arbitration. Each Treaty also contained a "Service of Suit" clause, which provided that:

> It is agreed that in the event of a failure of the [retrocessionaires] hereon to pay any amount claimed to be due hereunder, [retrocessionaire], at the request of the reinsured, will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction . . .
>
> It is further agreed that service of process in such suit may be made upon Messrs. Mendes & Mount . . . and that in any suit instituted against [retrocessionaires], [retrocessionaires] will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.
>
> [Mendes & Mount] are authorized and directed to accept service of process on behalf of [retrocessionaires] in any such suit and/or upon the request of the reinsured to give a written undertaking to the reinsured that they will enter a general appearance upon [retrocessionaire's] behalf in the event such suit will be instituted.
>
> Further, pursuant to any statute of any state, territory or district of the United States which makes provision therefor, [retrocessionaires] hereby designate the Superintendent, Commissioner or Director of Insurance or other officer specified for that purpose in the statute, or his successor or successors in office, as their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the

> reinsured . . . and hereby designate the above-named as the person to whom the said officer is authorized to mail such process or a true copy thereof.

The New York law firm of Mendes & Mount was designated as the party to accept service for Banco. Each Treaty also contained an "intermediary clause," which designated Pritchard & Baird, Inc., ("Pritchard") as the "intermediary . . . through whom all communications and transactions relating thereto shall be transmitted by the parties."

Pursuant to the intermediary clause, Wausau and the retrocessionaires originally communicated through Pritchard. However, Pritchard became insolvent in 1975, and the parties to the Treaties thereafter used Leslie & Godwin, a British firm, as an intermediary. The parties never amended their Treaty to reflect this change. Leslie & Godwin contacted Banco through another intermediary, Argenhall, S.A., an Argentine brokerage firm.

In 1984, Wausau began to submit proofs of loss to Leslie & Godwin and to Lord, Bissell & Brook, counsel to the lead underwriter among the retrocessionaires, Merrett Syndicate. These proofs of loss showed that policy-holders on policies reinsured by Wausau suffered extensive injuries related to asbestos contamination. Merrett Syndicate engaged Lord, Bissell & Brook to audit these claims and determine whether they fell within the scope of the Treaties. Despite continued submissions of proofs of loss, the retrocessionaires refused to reimburse Wausau for its losses.

By 1991, Wausau determined that the retrocessionaires had not complied with the terms of the Treaties. On May 27, 1991, Wausau sent a demand for arbitration to Lord, Bissell & Brook, as agent for Merrett Syndicate, according to the

custom of Lloyd's, London that the lead underwriter traditionally handles claims on behalf of all underwriters in a syndicate. Lord, Bissell & Brook then forwarded Wausau's arbitration demand to Leslie & Godwin, who attempted to notify the other retrocessionaires. In June 1991, Leslie & Godwin sent Argenhall a letter informing Banco of Wausau's arbitration demand and asking for confirmation that Lord, Bissell & Brook would represent them. Banco claims that it never received this communication. In the letter, Leslie & Godwin requested that Banco respond, but Banco did not.

On August 19, 1991, Wausau petitioned the Marathon County Circuit Court in Wisconsin for an order compelling the retrocessionaires to proceed with arbitration. The Wisconsin Commissioner of Insurance was served with two copies of the petition, and Mendes & Mount was served with one copy. In addition, Wausau provided Leslie & Godwin and Lord, Bissell & Brook each with a copy of the petition. The caption of the petition identified the respondents to the petition as including "certain London Market Insurance Companies, including those identified in Appendix A." Appendix A to the petition lists among the respondents the following two parties: "Banco" and "Banco di Seguros del Estado." Banco claims that Mendes & Mount did not notify it of the petition.

The trial court granted Wausau's motion in October 1991, and the Wisconsin Court of Appeals affirmed the circuit court's decision in Employers Ins. of Wausau v. Jackson, 505 N.W.2d 147 (Wis. Ct. App. 1993). In February 1995, the Wisconsin Supreme Court also affirmed. See Employers Ins. of Wausau v. Jackson, 527 N.W.2d 681 (Wis. 1995). The arbitration proceedings commenced in the summer of 1995. In August 1995, Leslie & Godwin again contacted Argenhall and attempted to inform Banco that it was a party in the arbitration proceeding and to ask Banco if it wished Lord, Bissell & Brook to represent it in the proceedings.

Banco did not respond to this message and did not participate in the proceedings.

On September 18, 1995, the arbitration panel issued an award in favor of Wausau in the amount of $7,783,324 as a full and final settlement of all its loss claims. The retrocessionaires were each liable for a portion of the award, which varied according to each retrocessionaire's proportionate share of the coverage allocation. The retrocessionaires were given forty-five days to pay their respective shares. If they did not pay, each would be subject to stiff penalties, including 7.5 percent interest and joint and several liability for attorneys' fees and costs, and would be required to provide a $9,000,000 letter of credit to Wausau to secure payment of the retrocessionaires' ultimate liability. Banco's share of the total award was $181,319, but Banco was not listed on the arbitration award. Banco claims that it was never informed of the arbitration proceedings, and it has not paid either its share of the award or its additional penalties, which now exceed $9,000,000.

In July 1998, Wausau filed a petition to confirm the arbitration award as to Banco in the United States District Court for the Western District of Wisconsin. Wausau served this petition on both the Wisconsin Commissioner of Insurance and on Mendes & Mount. Banco's name was listed in the caption, and Mendes & Mount caused process to be served on Banco at its principal place of business in Montevideo, Uruguay. Banco responded to the motion with a motion to vacate the arbitration panel's award. It claimed that it had never received notice of the arbitration and was not properly served in accordance with Wisconsin law or the requirements of the FSIA. On January 5, 1999, the district court denied Banco's motion to vacate and granted Wausau's motion to confirm. The court found that service on Mendes & Mount and the Wisconsin Commissioner of Insurance of the petition to compel arbitration was sufficient to meet the

requirements of the Treaties, Wisconsin law and the constitutional right to due process.

II. Analysis

On appeal, Banco argues that the district court erred by determining that Wausau's service of process was effective as to Banco, and it argues that the court made clearly erroneous findings of fact in granting Wausau's motion to confirm its arbitration award. In reviewing the grant of a motion to confirm an arbitration award, we decide questions of law de novo and review findings of fact for clear error. See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 947-48 (1995); Geneva Secs., Inc. v. Johnson, 138 F.3d 688, 691 (7th Cir. 1998).

As an instrumentality of the sovereign state of Uruguay, Banco is a "foreign state" within the meaning of sec.sec. 1603 (a)-(b) of the FSIA. See sec. 1603(a) ("A 'foreign state' . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)."); sec. 1603(b)(1)-(3) (defining "instrumentality" as "a separate legal person, corporate or otherwise . . . which is an organ of a foreign state . . . or a majority of whose shares or other ownership interest is owned by a foreign state . . . which is neither a citizen of a State of the United States . . . nor created under the laws of any third country"). Foreign states possess immunity from the jurisdiction of courts of the United States, except as specified by the FSIA. See sec.sec. 1604-1607. By agreeing to a Treaty which designated Wausau, Wisconsin, as the site of any arbitration, however, Banco has waived its immunity in any proceeding to confirm the arbitral award. See sec. 1605(a)(6)(A). Federal courts have original subject matter jurisdiction over all suits involving foreign states, see sec. 1330(a), and Banco admits that Wausau's motion to confirm satisfied the FSIA service requirements, so there is also

personal jurisdiction over Banco in this matter. See sec.sec. 1330(b), 1608(b)(1).

Because the United States and Uruguay are both signatories, the Inter-American Convention on International Commercial Arbitration ("Inter-American Convention") Article V(1)(b), Jan. 30, 1975, reprinted at 9 U.S.C. sec. 301, governs the procedure of confirming an arbitral award as well as the procedure of refusal for an award.[1] Section 302 of the Inter-American Convention incorporates certain sections of the New York Convention, codified at 9 U.S.C. sec.sec. 201-208, into arbitration proceedings where both parties are citizens of signatory states. See 9 U.S.C. sec. 302 (incorporating 9 U.S.C. sec.sec. 202-205, 207); see also Jain v. de Mere, 51 F.3d 686, 689 (7th Cir. 1995) ("[A]ny commercial arbitral agreement, unless it is between two United States citizens, involves property located in the United States, and has no reasonable relationship with one or more foreign states, falls under the [New York] Convention.").

Under the New York Convention, within three years of any arbitral award any party to the arbitration may apply to

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[1] As the district court noted, since both the United States and Uruguay are also signatories of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), Dec. 29, 1970, reprinted at 9 U.S.C.A. sec. 201, codified at 9 U.S.C. sec.sec. 201-208, unless a majority of the other retrocessionaires are also signatories of the Inter-American Convention, the New York Convention would actually apply to this dispute. See 9 U.S.C. sec. 305. However, as we discuss below, the provisions of both conventions are interpreted to reach the same result in each case, and, lacking knowledge of the signatory status of the home states of the remaining retrocessionaires, the parties have stipulated that the Inter-American Convention shall apply. Since the outcome would not be affected if we instead applied the New York Convention, we agree with the district court that "the point appears to be technical."

any court with jurisdiction for an order confirming the award against any other party to the arbitration. See 9 U.S.C. sec. 207; Generica Ltd. v. Pharmaceutical Basics, Inc., 125 F.3d 1123, 1129 (7th Cir. 1997). That court shall confirm the award "unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in [the Inter-American] Convention." 9 U.S.C. sec. 207 (as applied in 9 U.S.C. sec. 302 to the Inter-American Convention). Article V of the Inter-American Convention specifies seven grounds for refusal of recognition, among them that a party "was not duly notified of the appointment of the arbitrator or of the arbitration procedure to be followed or was unable, for any other reason, to present his case . . . ." Inter-American Convention, Article V(1)(b).

Although arbitration "is simply a matter of contract between the parties," First Options, 514 U.S. at 943, and the parties to a contract can choose to modify the technical requirements for notice of arbitration in the same way that they can modify any other arbitration procedure, there is no evidence in the Treaties between Banco and Wausau of any special notification procedure to be followed in the event of an arbitration. Absent any agreement to the contrary, Article V(1)(b) grants a party the due process rights of the forum state, in this case those of Wisconsin and the United States. See Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier, 508 F.2d 969, 975-76 (2d Cir. 1974) (interpreting analogous Article V(1)(b) of New York Convention). See also Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc., 23 F.3d 41, 45 (2d Cir. 1994) (stating that Inter-American Convention is "intended . . . to reach the same results as those reached under the New York Convention"). The right to adequate notice is one part of a fundamentally fair hearing. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice

reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."). However, like all other due process rights, the right to notice may be waived prior to attachment. See D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185 (1972). Accordingly, if Banco did not waive its right to notice and was not provided with notice reasonably calculated under the circumstances of arbitration, we may refuse to enforce the award pursuant to Article V(1)(b).

A. Waiver

The Treaties between Banco and Wausau contain a "Service of Suit" clause which designates that, in any suit filed to recover any amount of money due under the Treaties, Mendes & Mount and the Wisconsin Commissioner of Insurance may be served as Banco's agents for service of process. Wausau argues that by designating special agents for the service of process Banco has waived its right to notice reasonably calculated to apprise it of the pending arbitration.

For an American court to assert personal jurisdiction over a foreign defendant, the court must generally determine that the company has "purposefully avail[ed] itself of the privilege of conducting activities within the forum State." Hanson v. Denckla, 357 U.S. 235, 253 (1958); see also Koster v. Automark Indus., 640 F.2d 77, 78 (7th Cir. 1981). However, by agreeing to designate an agent for service of process, as Banco has, foreign companies can waive this requirement of "minimum contacts." See RAR, Inc. v. Turner Diesel, Ltd., 107 F.3d 1272, 1280 (7th Cir. 1997) (holding that, because personal jurisdiction is waivable, parties can contract around minimum contacts requirement). Personal jurisdiction in a given dispute is conditioned on both a court's ability to assert jurisdiction over a defendant

and a defendant's receipt of notice and opportunity to be heard. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985) (distinguishing right to notice from right to personal jurisdiction); Fuentes v. Shevin, 407 U.S. 67 (1972). By designating a local agent to serve process, Banco knowingly waived its right to dispute personal jurisdiction. There is no evidence that Banco knowingly waived its right to "notice reasonably calculated." Without knowledge, we are loath to determine that a party has waived its due process rights. See, e.g., Sethness-Greenleaf, Inc. v. Green River Corp., 65 F.3d 64, 67 (7th Cir. 1995) ("[W]aiver in contract law is the intentional relinquishment of a known right"). We find that Banco's designation of an agent for service of process did not constitute a waiver of its right to notice reasonably calculated to allow it to be heard.

B. Notice Reasonably Calculated

Banco admits that a copy of the motion to compel arbitration was served by a proper person on its designated agents. It argues that the motion itself was insufficient to provide notice to either Banco or its agents that Banco was a party to the arbitration. Banco relies on three contentions to assert that Wausau's motion is insufficient to provide notice reasonably calculated to Banco or its agents: (1) Wausau did not follow proper Wisconsin procedures in its service of process on Banco's agents; (2) Wausau failed to follow the special service of process procedure required by the FSIA for foreign sovereigns; (3) even if Wausau followed the proper Wisconsin procedures, these procedures do not provide "notice reasonably calculated" as required by the United States Constitution and the Wisconsin Constitution.

Banco contends that Wausau failed to meet Wisconsin's notice requirement because it failed to list Banco in the caption of its motion to compel arbitration and it failed to serve a formal summons with its motion on Banco's agents.

Banco argues that the parties did not specify by contract the rules under which arbitration would be conducted. Therefore, because Article V(1)(b) requires that, absent a waiver, arbitration proceedings must meet the due process rights of the forum state, see Iran Aircraft Indus. v. Avco Corp., 980 F.2d 141, 145-46 (2d Cir. 1992), Wausau needed to meet both the notice requirements and the statutory service requirements of the forum state.

We disagree with Banco's contention that Article V(1)(b) of the Inter-American Convention requires that service of process be made in accordance with the forum state's service of process statute. Service of process according to statute raises a presumption that due process has been met. See Mid-America Tablewares, Inc. v. Mogi Trading Co., 100 F.3d 1353, 1358-59 (7th Cir. 1996) (Wisconsin Constitution grants personal jurisdiction whenever state long-arm statute has been met, as long as statute meets due process requirements of federal Constitution); Federated Rural Elec. Ins. Corp. v. Inland Power & Light Co., 18 F.3d 389, 391 (7th Cir. 1994). However, Article V(1)(b) only provides Banco with the protection of due process, and due process does not require Wausau to meet state statutory requirements for service of process. See Osteen v. Henley, 13 F.3d 221, 225 (7th Cir. 1993) ("[A] violation of state law . . . is not a denial of due process, even if the state law confers a procedural right."). It only requires that Wausau provide Banco with "notice reasonably calculated" under the federal due process standard. See generally Waterspring, S.A. v. Trans Marketing Houston Inc., 717 F.Supp 181, 186 (S.D.N.Y. 1989) ("An agreement to arbitrate in New York constitutes a consent to submit to the personal jurisdiction of the courts of New York, and such consent 'includes consent to service by any method consistent with due process.'"); Lawn v. Franklin, 328 F.Supp. 791, 794 (S.D.N.Y. 1971) ("Where there is advance consent to the jurisdiction by contract the service of process may be made by any method

consistent with due process."). Thus two of Banco's arguments may be merged into one; that by failing to name it in the caption of its motion and providing Mendes & Mount with only one copy of the motion, Wausau failed to provide Banco with "notice reasonably calculated." Both the United States and Wisconsin adhere to the standard of "notice reasonably calculated" enunciated in Mullane. See Greene v. Lindsey, 456 U.S. 444, 449-50 (1982); Dillon v. Dillon, 176 N.W.2d 362, 365-66 (Wis. 1970) (adopting Mullane notice standard, along with compliance with state long-arm statute, as the due process requirement for Wisconsin Constitution).

Under Wisconsin law, a principal is "bound and affected by such knowledge and notice as its agents received." Lakeshore Commercial Fin. Corp. v. Bradford Arms Corp., 173 N.W.2d 165, 172 (Wis. 1970). See generally Smith v. Metropolitan Life Ins., 94 F.2d 277, 280 (7th Cir. 1938) (finding notice to a designated agent binding on party). Here, Banco's designation of registered agents for service of process created an agency relationship from which actual notice, rather than constructive notice, must be inferred. See Peterson v. Sealed Air Corp., 902 F.2d 1232, 1237 (7th Cir. 1990). Service upon a duly appointed agent comports with the due process clause. See Nat'l Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 317-18 (1964); Kaplan v. United States, 133 F.3d 469, 475 (7th Cir. 1998). In Kaplan, we found that providing notice to a designated "notice partner" in a limited partnership satisfied the due process notice requirement for other limited partners who were not personally given notice. Appellants argued that certain provisions of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), 26 U.S.C. sec.sec. 6621-34, were unconstitutional because it denied due process to certain partners with a de minimis stake in the partnership personal notice of an adjustment to a limited partnership's taxes. In finding that notice to some partners imputed notice upon all members of the partnership, we noted the "common-law

principle of partnership law that notice to one general partner constitutes notice to all partners." Kaplan, 133 F.3d at 475. That common-law principle depends on the characterization of a partnership as a web of interlocking agency relationships, in which each principal is imputed actual knowledge from the knowledge of any of his agents. We find the principle set forth in Kaplan applicable to the facts before us. Thus, if either Mendes & Mount or the Wisconsin Commissioner of Insurance received actual notice that Banco was subject to the Wausau arbitration, then Banco received notice sufficient to meet the requirements of due process.

Banco rests its contention that Wausau did not serve its agents with adequate notice that Banco was a party on two facts: (1) the motion to compel arbitration fails to list Banco correctly in either the official caption or Appendix A; (2) each agent was provided with only one copy of process, despite the large number of retrocessionaires. Banco argues that Wausau instead should have sent a copy of process to Banco's (and every other retrocessionaire's) principal place of business. However, "notice reasonably calculated" requires only that the notice provided "be of such nature as reasonably to convey the required information." Mullane, 339 U.S. at 314. In the circumstances before us, Wausau was merely required to inform Banco, or one of its registered agents, of its motion to compel arbitration against the syndicate, or of its wish to conduct arbitration.

No reasonable person could be expected to serve more than 100 copies (that is, one copy for each retrocessionaire) of the same motion on Mendes & Mount and the Commissioner of Insurance. As the district court noted, the purpose of the Service of Suit clause is, in part, to anticipate the burden of personally serving the numerous members of each Lloyd's syndicate individually and avoid it by designating a uniform agent for all. Moreover, knowing that the same person would be agent to each of the

retrocessionaires, no reasonable person would expect each retrocessionaire to be listed in the caption. If the agent must index the Appendix to find the names of some retrocessionaires, it would not be unreasonable to expect the agent to do so for all of them. Had Wausau not erroneously listed Banco in the Appendix as either "Banco" or "Banco di Seguros del Estado," there would be no reason to question that it provided Banco's agents with "notice reasonably calculated" to apprise them of Banco's involvement in the pending arbitration.

Wausau misspelled Banco's name in the Appendix, so we must consider whether this error is one of sufficient magnitude to compromise Wausau's attempt to provide Banco with notice. We will not allow a technical error such as a spelling mistake to implicate Banco's right to due process, because both Mendes & Mount and the Wisconsin Commissioner of Insurance had the duty as agents of Banco to make a reasonable inquiry into who "Banco di Seguros del Estado" might be. See, e.g., Dombeck v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co., 129 N.W.2d 185, 194 (Wis. 1964) ("The general rule is that a principal may recover from his agent for loss or damage caused the principal by the negligent act of the agent."). The burden of deciphering the technical error in its principal's name in this case should rest on Banco's agents: the Wisconsin Commissioner of Insurance and Mendes & Mount. Thus, we agree with the district court that Wausau's service of its motion on both Mendes & Mount and the Wisconsin Commissioner of Insurance provided Banco with "notice reasonably calculated" of the pending arbitration.

In the alternative, Banco argues that, as the instrumentality of a foreign sovereign, it has general immunity from suit in the United States, subject only to the exceptions of the FSIA. Pursuant to the FSIA, certain formalities must be followed in the proper service of a

complaint. Section 1608 of the FSIA requires that service be made "(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality . . . ," or "(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents." Id. at sec. 1608(b)(1)-(2).

Banco contends that the only clause in the treaty that could constitute a "special arrangement" for the purposes of the act was the intermediary clause, but neither it nor the procedures of any applicable international convention were followed. In addition, Banco notes that Wausau never served the summons required in both sec. 1608(b)(1) and sec. 1608(b)(2). Therefore, Banco contends that it was never properly served with notice of the pending arbitration.

Banco's attempts to shield itself beneath the procedural requirements of the FSIA merely obfuscate the real issue of notice. Banco seems to believe that any improprieties in Wausau's service of the motion to compel arbitration relieve Banco of notice of the arbitration. Instead, such an impropriety would render Banco immune to the action compelling parties to arbitrate. Wausau admittedly did not serve Banco with a summons, so might not have been able to compel Banco into arbitration.

Other retrocessionaires were compelled to enter arbitration with Wausau, and arbitration occurred. By agreeing to the arbitration provision in its Treaty, Banco agreed to submit itself to the decision made by any arbitrators empaneled pursuant to the arbitration clause. Banco is bound to the arbitral award not by the motion to compel arbitration, but by the language of the Treaty that it made with Wausau.

Banco, of course, could have retained immunity from any proceedings to confirm the award had Wausau not served notice of the motion to confirm an arbitration award. However, Wausau properly served notice of the motion to confirm, and we must confirm the award regardless whether Banco could have been forced to participate in the arbitration. See 9 U.S.C. sec. 207 ("The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [Inter-American] Convention." (emphasis added)). We have already determined that Banco had notice as required by Article V(1)(b) of the Inter-American Convention, and any fault in Banco's inability to appear at the arbitration rests with Banco's designated agents, not with Wausau. Absent any grounds for refusal of recognition of the award, we are compelled by the Inter-American Convention to confirm it.

Banco also obfuscates the issue of notice by claiming that the arbitration award was, in effect, a default judgment, so the requirements of sec. 1608(e) of the FSIA must be met. Section 1608 requires that any claimant of a default judgment establish his right to relief "by evidence satisfactory to the court." sec. 1608(e). However, sec. 1608(e), like the rest of the FSIA, refers to judicial proceedings. Wausau never sought a default judgment against Banco; instead it seeks to confirm an arbitral award in the manner provided by the FSIA. Section 1608(e)does not apply.

C. Findings of Fact

Banco also argues that the district court made clearly erroneous findings of fact which led it incorrectly to grant Wausau's motion to confirm. Banco disputes three "undisputed facts" found by the district court: (1) Wausau notified all retrocessionaires of its filing of suit by service on

Mendes & Mount; (2) a custom exists at Lloyd's, London that the petitioner need only inform the lead retrocessionaire of matters relating to the operation of the Treaties; (3) Leslie & Godwin had not communicated directly with Banco, but instead sent information in care of Argenhall. We review findings of fact made in motions to confirm arbitration for clear error, see First Options, 514 U.S. at 947-48, and will reverse the trial court only if we come to a "definite and firm conviction" that it made a mistake. Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).

We are unconvinced that any of the district court's findings of undisputed fact are clearly in error. Banco contends that, because it disputes receiving notice of the arbitration after Wausau served Mendes & Mount, all the retrocessionaires did not receive notice of the pending arbitration. We have found that each retrocessionaire listed in the caption of the motion to compel arbitration must be imputed to have received actual notice by service on Mendes & Mount. Because Banco does not provide us with evidence that any other retrocessionaire was omitted from the motion to compel arbitration, we see no error in the district court's finding.

In holding that Banco received notice of arbitration by Wausau's service of the motion to compel, we do not rely on any of the other findings of fact that Banco urges us to review. As such, these findings do not prejudice Banco, and "[a]n error that is not prejudicial is still an error, but it is unlikely to be a clear error." Chaulk v. Volkswagen of America, Inc., 808 F.2d 639, 644 (7th Cir. 1986) (Posner, J., dissenting). After our review of the facts, we find that Banco presented the district court with no evidence to controvert either of the other undisputed facts that it asserts were found erroneously. Absent any evidence that would tend to

contradict such findings, we find no clear error in the other findings of fact made by the district court.

III. Conclusion

Because we find that Wausau's motion to compel arbitration effectively gave Banco notice of arbitration proceedings and because we find that the district court made no clearly erroneous findings of fact in confirming the arbitration award in favor of Wausau or in denying Banco's motion to vacate the arbitration award, the decisions of the district court are AFFIRMED.

APPENDIX L

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY,
Petitioner,
v.

OPINION AND ORDER

BANCO SEGUROS DEL ESTADO,
Respondent.

98-C-0521-C

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This case involves a dispute over reinsurance "treaties" petitioner Employers Insurance of Wausau acquired at Lloyd's of London. The treaties obligated the underwriters (or Retrocessionaires) to reimburse petitioner for certain types of claims made upon it. The Retrocessionaires denied that they were bound under the treaties to reimburse petitioner for certain asbestos-related losses. To settle the dispute, petitioner invoked the treaties' arbitration clause. It won, obtaining an award against the Retrocessionaires for more than $ 7,000,000 together with nearly $ 1,000,000 in attorney fees.

Presently, petitioner has moved to confirm the award against respondent Banco Seguros Del Estado (the state bank of the Republic of Uruguay), pursuant to the Inter-American Convention on International Commercial Arbitration, reprinted in *9 U.S.C.A. § 301* (West Supp. 1998). In a cross motion, respondent moves to vacate the award, contending that the award is invalid because petitioner did not give proper notice of the arbitration. Respondent argues that, as a foreign state, it should have received notice consistent with

the requirements of the Foreign Sovereign Immunities Act, *28 U.S.C. § § 1602*-1611. Alternatively, it argues that the method petitioner relied on to deliver notice was inconsistent with due process standards of the forum state of the arbitration, the state of Wisconsin.

In an order entered November 4, 1998, I advised the parties that respondent's motion to vacate would be decided on the briefs filed as of that date and that further briefing on petitioner's motion to confirm would be ordered if necessary. It is not: both motions may be decided now.

Briefly, I conclude that because petitioner gave notice of its invocation of the arbitration clause in a manner consistent with the terms of the treaties and the business custom of Lloyd's of London, respondent received adequate notice as guaranteed by the Inter-American Convention and due process. Respondent's motion to vacate will be denied. Separately, I find no basis to respondent's contention that the award cannot be confirmed as a matter of equity. There being no valid objection to the award, petitioner's motion to confirm will be granted.

The facts are taken from three sources: the allegations of petitioner's petition to confirm the arbitration award, respondent's answer to the petition, and the affidavits and exhibits the parties filed in support of their cross-motions. These materials are properly considered without an evidentiary hearing. The Inter-American Convention incorporates non-conflicting components of the Federal Arbitration Act, *9 U.S.C. § § 1*-16. See *9 U.S.C. § § 208,* 305. One such non-conflicting component is § 6, which provides that applications concerning arbitration awards "shall be made and heard in the manner provided by law for the making and hearing of motions." This section affords courts discretion to devise their own procedures for deciding arbitration-related motions, including the power to decide

motions related to arbitral awards without a hearing. See *Legion Insurance Co. v. Insurance General Agency, Inc., 822 F.2d 541, 541-43 (5th Cir. 1987)* (district court properly declined to consider evidence beyond that presented in documents filed to support and oppose motion to confirm arbitration award); see also *Imperial Ethiopian Government v. Baruch-Foster Corp., 535 F.2d 334, 337 n. 10 (5th Cir.1976)* (district court not required to hold evidentiary hearing in order to decide issue under Convention on the Recognition and Enforcement of Foreign Arbitral Awards, reprinted in § *9 U.S.C.A. § 201* (West Supp. 1998)).

I find that the following facts are undisputed.

UNDISPUTED FACTS

Petitioner Employers Insurance of Wausau is a mutual insurance company organized under the laws of the state of Wisconsin with its principal place of business in Wausau, Wisconsin. Respondent Banco de Seguros del Estado is the state insurance bank of the Republic of Uruguay. During all relevant times, its principal place of business has been Montevideo, Uruguay.

Between 1966 and 1973, petitioner entered into a series of excess retrocessional insurance "treaties" with underwriters, (or Retrocessionaires), at Lloyd's of London. In effect, the subject treaties obligated the Retrocessionaires to pay petitioner specified percentages of losses incurred by petitioner that were within the coverage of the treaties.

The Retrocessionaires are a group comprising more than one hundred individuals and firms, including respondent. When there are many underwriters to a policy sold at Lloyd's market, it is customary that the underwriter accepting the greatest portion of the risk is designated the lead underwriter and it assumes responsibility for servicing

claims on behalf of all the underwriters. With respect to the subject treaties, the Merrett Syndicate is the lead Retrocessionaire.

Two London firms brokered the placement of the treaties, Pritchard & Baird, Inc., and Leslie & Godwin, Ltd. Although only Pritchard & Baird is designated in the treaties as the "intermediary" through whom "all communications and transactions" are to be transmitted by the parties, in practice, when Pritchard & Baird received a communication from petitioner, it forwarded the communication to Leslie & Godwin, which would actually notify the Retrocessionaires. Hence, in 1977, when Pritchard & Baird became insolvent, Leslie & Godwin simply began to relay information directly between petitioner and the Retrocessionaires. However, the treaties were not amended to name Leslie & Godwin as the formal intermediary.

Textually, the various treaties written for the period 1966 to 1973 are identical except for changes in allocations of loss percentages. Each of the treaties contains an arbitration clause which provides:

> If any dispute or difference of opinion shall arise with reference to the interpretation of this. Agreement of the rights with respect to any transaction involved, the dispute shall be referred to three arbitrators, who shall be executive officers of insurance companies domiciled in the U.S.A., one to be chosen by [petitioner], one to be chosen by the Retrocessionaire[s], and the third by the two arbitrators so chosen within 30 days of their appointment.

* * *

> The decision of a majority of the arbitrators shall be final and binding on both parties. The expense of the arbitrators and of the arbitration shall be equally divided between each party. Any such arbitration shall be equally divided between each party. Any such arbitration shall take place in Wausau, Wisconsin, unless some other location is mutually agreed upon.

Also, the treaties contain a "Service of Suit Clause," which provides, in part:

> It is agreed that in the event of the failure of [the Retrocessionaires] to pay any amount claimed to be due hereunder, [the Retrocessionaires], at the request of [petitioner], will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.
>
> It is further agreed that service of process in such suit may be made upon Messrs. Mendes & Mount, 27 William Street, NEW YORK, and that in any suit instituted against any one of them upon this contract, [the Retrocessionaires], will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.
>
> The above-named are authorized and directed to accept service of process on behalf of [Retrocessionaires] in any such suit and/or upon the request of [petitioner] to give a written undertaking to [petitioner] that [Mendes &

> Mount] will enter a general appearance upon [the Retrocessionaires'] behalf in the event such a suit shall be instituted.

Beginning in 1984, petitioner sought reimbursement for asbestos-related claims and submitted proofs of loss to Leslie & Godwin. In response, the Merrett Syndicate retained the law firm of Lord, Bissell & Brook to audit petitioner's payment of such claims, as the Retrocessionaires had the right to do under the treaties.

By 1991, the Retrocessionaires still had not reimbursed petitioner for its asbestos-related losses. In May, petitioner sent a demand for arbitration to Lord, Bissell & Brook directly. Lord, Bissell & Brook forwarded the demand to Leslie & Godwin, which responded to petitioner in June 1991, that it had "already advised the leading underwriter" and that it was "now proceeding to notify the remaining market." Leslie & Godwin told petitioner that "as soon was we have contacted the full market, we will confirm this to you."

Since the signing of the treaties, Leslie & Godwin had not been sending information to respondent directly. Instead, it sent information to respondent in care of an Argentinean insurance brokerage, Argenhall, S.A., whose place of business is in Buenos Aires, Argentina. Consequently, after petitioner made its arbitration demand, Leslie & Godwin sent a letter on June 27, 1991, to respondent, in care of Argenhall, advising respondent that petitioner had demanded arbitration and that each Retrocessionaire was being asked to confirm that Lord, Bissell & Brook should represent the Retrocessionaires collectively. On July 22, 1991, Leslie & Godwin sent a follow-up facsimile to respondent, also in care of Argenhall, requesting once more that respondent confirm the appointment of Lord, Bissell & Brook.

In August 1991, petitioner filed an action in the Circuit Court for Marathon County, Wisconsin, asking the court to compel the Retrocessionaires to proceed with arbitration. Respondent was named a respondent in the proceeding. Pursuant to the Service of Suit clause within the treaties, petitioner notified the Retrocessionaires of its filing of suit in Wisconsin state court by serving notice upon the firm of Mendes & Mount. (The record also establishes that respondent was notified of the filing of the present suit to confirm the arbitration award in the same way: by service upon Mendes & Mount.)

At first, some of the Retrocessionaires tried unsuccessfully to remove the Wisconsin state court proceeding to federal court. See *Employers Insurance of Wausau v. Certain Underwriters at Lloyd's, London, 787 F. Supp. 165* (W.D. Wis.), aff'd sub. nom., In the *Matter of Robin A.G. Jackson, 964 F.2d 706 (7th Cir. 1992).* After proceedings returned to state court, issues concerning the enforcement of the arbitration clause and selection of arbitrators were litigated. See *Employers Insurance of Wausau v. Robin A.G. Jackson, 178 Wis. 2d 755, 505 N.W.2d 147 (Ct. App. 1993),* aff'd, *190 Wis. 2d 597, 527 N.W.2d 681 (1995).* Eventually, by the summer of 1995, the clause was held enforceable, the arbitrators were named and the merits were resolved.

The arbitration panel issued its decision on September 18, 1995. The panel determined that petitioner was entitled to a total of $ 7,783,324 from the Retrocessionaires. Of this amount, Respondent's share is $ 181,319. Additionally, the panel's order provides:

> If such amounts are not tendered by [the Retrocessionaires], either individually or collectively, within 45 days of the date of this

award, the Panel makes the following additional awards:

1) Interest from the date of this award at a compound annual rate of 7.5%;

2) Attorneys fees and costs of $ 930,730 for which [the Retrocessionaires] are jointly and severally liable;

3) At the expiration of a period of 45 days following the date of this award, London respondents shall provide a Letter of Credit to Employers of Wausau in the amount of $ 9,000,000 in a form acceptable to the Wisconsin Insurance Department and to secure payment of the ultimate liability in this matter.

Respondent did not appear or participate in the arbitration or related judicial proceedings.

DISPUTED FACTS

Respondent asserts that it was not a client of Lord, Bissell & Brook and that it did not participate in the audit performed on behalf of the Retrocessionaires. Respondent denies that it received the June 27, 1991 letter or follow-up facsimile Leslie & Godwin sent to Argenhall and that its files contain any evidence that it received actual notice of the arbitration.

OPINION

Two issues must be explored in resolving the cross motions to vacate and to confirm the arbitration award. First, because respondent is an arm of the Republic of

Uruguay, the requirements of the Foreign Sovereign Immunities Act must be satisfied because the Act is the sole means of obtaining jurisdiction over a foreign state in federal court. See *Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434, 102 L. Ed. 2d 818, 109 S. Ct. 683 (1989).* Second, because Uruguay is a signatory of the Inter-American Convention on International Commercial Arbitration, the award may be vacated (and cannot be confirmed) if it was obtained in violation of this treaty. Although the parties do not dispute that the Foreign Sovereign Immunities Act is satisfied and that this court may exercise jurisdiction over respondent, I will discuss the Act briefly to aid understanding of the disputed issue: whether the award was obtained in violation of the Inter-American Convention's notice provision.

A. Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act governs subject matter and personal jurisdiction in actions involving foreign states. Concerning subject matter jurisdiction, the Act is drafted in the negative. Federal district courts have subject matter jurisdiction provided the foreign state is *not* entitled to immunity under the Act. See *28 U.S.C. § 1330*(a). Also, federal courts may exercise personal jurisdiction over foreign states insofar as they have been given notice in accordance with the Act. See § 1330(b).

In this action, subject matter jurisdiction exists because the arbitration clause within the retrocessional treaties state that any arbitration "shall take place in Wausau, Wisconsin." Under the Foreign Sovereign Immunities Act, a foreign state has no immunity from a proceeding to confirm an arbitral award where the arbitration "is intended to take place in the United States." See § 1605(a)(6)(A). Alternatively, subject matter jurisdiction exists because confirmation of the award is sought under the Inter-

American Convention. A foreign state has no immunity from a proceeding to confirm an award that "may be governed by a treaty . . . calling for the recognition and enforcement of arbitral awards." § 1605(a)(6)(B).

Moreover, because the Foreign Sovereign Immunities Act's notice requirements have been satisfied, this court may exercise personal jurisdiction over respondent. The parties agree that respondent is an "agency or instrumentality of a foreign state" under § 1603(b). Under the Act, an agency or instrumentality of a foreign state has sufficient notice of a suit when the summons and complaint are delivered "in accordance with any special arrangement for service." See § 1608(b)(1). Respondent was notified of petitioner's intention to confirm the arbitral award pursuant to the Notice of Suit provision of the treaties: petitioner served a summons upon the Retrocessionaires' designated agent, Mendes & Mount.

B. Inter-American Convention on International Commercial Arbitration

The centerpiece of respondent's contention that the award must be vacated rests on Article 5 of the Inter-American Convention, which provides in pertinent part:

> 1. The recognition and execution of the decision may be refused, at the request of the party against which it is made, only if such party is able to prove to the competent authority of the State in which recognition and execution are requested:
>
> * * *
>
> b. That the party against which the arbitral decision has been made was not *duly notified of the appointment of the*

> *arbitrator* or of the arbitration procedure to be followed, or was unable, for any other reason, to present his defense;

Inter-American Convention on International Commercial Arbitration, Jan. 1, 1975, reprinted in *9 U.S.C.A. § 301* (West Supp. 1998) (emphasis added).

There is little case law interpreting the Inter-American Convention. But respondent garnishes its presentation with case law interpreting the related Convention on the Recognition and Enforcement of Foreign Arbitral Awards, reprinted in *9 U.S.C.A. § 201* (West Supp. 1998), which is known commonly as the "New York Convention." It is a good choice because the New York Convention contains a notice provision similar to that of the Inter-American Convention. Article V, § 1(b) of the New York Convention provides that a court may decline to confirm an award if the party resisting confirmation was not given "proper notice." See also *Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc., 23 F.3d 41, 45 (2d Cir. 1994)* ("Congress intended the Inter-American Convention to reach the same results as those reached under the New York Convention.").

Turning to the meat, respondent first argues that notice of the arbitration, like notice of this lawsuit, should be evaluated under the notice provisions of the Foreign Sovereign Immunities Act. Respondent explains that petitioner's reliance on the lead Retrocessionaire to notify respondent of the arbitration was not part of a "special arrangement for service." See *28 U.S.C. § 1608*(b)(1). Thus, because petitioner did not meet the alternative methods of service under the Act, such as registered mail sent directly to the agency or instrumentality, see § 1608(b)(3)(B), respondent did not receive adequate notice of the arbitration as a matter of law. In support of the contention that the

Foreign Sovereign Immunities Act sets forth the standard for service of process in arbitration proceedings, respondent cites *Matter of the Arbitration Between Trans Chem. Ltd. and China Nat'l Mach. Import & Export Corp., 978 F. Supp. 266 (S.D. Tex. 1997),* aff'd, *161 F.3d 314 (5th Cir. 1998).*

This offering is indigestible. Respondent cannot find support in Trans Chemical Limited for its contention that the Foreign Sovereign Immunities Act sets forth a standard applicable to arbitration agreements. In Trans Chemical Limited, a privately-held Pakistani firm moved to confirm a Texas arbitral award against a state-owned Chinese firm. The Chinese firm argued that the district court lacked jurisdiction to confirm the award because the motion to confirm had not been served in accordance with the Foreign Sovereign Immunities Act. See *Trans Chemical Limited, 978 F. Supp. at 297.* The court disagreed, noting that the agreement between the firms incorporated the Procedures of the American Arbitration Association and that the procedures provided for service by mail to the last known address of notice of judicial proceedings to confirm an arbitral award. Thus, the court concluded, the parties' agreement incorporated a "special arrangement for service" under *28 U.S.C. § 1608*(b)(1). See *Trans Chemical Limited, 978 F. Supp. at 298-99.*

Respondent is correct that the court held that "since the arbitration agreement entered into by the parties adopted the AAA rules, . . . this constituted 'special arrangement for service under the FSIA,'" see Respondent's Mem. in Supp. of Mot. to Vacate Award, dkt. # 7, at 15, but the issue in Trans Chemical Limited was whether notice was sufficient for jurisdiction to exist *in the proceeding to confirm the award.* Contrary to respondent's claim, the court was not addressing the separate issue whether the award could be vacated because the Chinese firm did not have adequate notice *of the arbitration.*

Respondent tries another argument. It cites *Parsons & Whitmore Overseas Co. v. Societe Generale de L'Industrie du Papier, 508 F.2d 969, 975 (2d Cir. 1974),* which holds that under the New York Convention, the adequacy of the arbitration notification should be measured in light of the forum state's standards of due process. Respondent cites *Dillon v. Dillon, 46 Wis. 2d 659, 176 N.W.2d 362 (1970),* which sets forth the requirements of "jurisdictional due process" in Wisconsin:

> The first requirement is that the manner of service employed must be reasonably calculated to give actual notice. "But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself *reasonably certain to inform those affected.*"

Id. at 665-66, 176 N.W.2d at 365 (quoting *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315, 94 L. Ed. 865, 70 S. Ct. 652 (1950)).* Respondent submits that petitioner's manner of notification was not reasonably calculated to inform respondent of its arbitration demand. Petitioner should have notified it directly, according to respondent; it was improper for petitioner to rely on Leslie & Godwin and the lead Retrocessionaire to act as intermediaries.

Respondent forgets that there were many Retrocessionaires and only one petitioner. In such circumstances, it is customary at Lloyd's for the party in

petitioner's shoes to deal with only one lead underwriter. Respondent expects too much if it believes that petitioner should have searched the globe to confirm that every Retrocessionaire had notice of the arbitration. Indeed, it is unsurprising that custom grants petitioner this advantage when one considers that the arbitration clause favors petitioner in another important respect: petitioner has the option of arbitrating in its home forum.

Perhaps one could argue that respondent's absence once the arbitration began should have alerted petitioner to the possibility that respondent had not been notified, but that argument has no force when one considers that petitioner had served notice upon Mendes & Mount when it brought the action in Wisconsin state court to compel the arbitration. After that time, petitioner had more reason to believe that respondent had *chosen* not to participate. See In the *Matter of Robin A.G. Jackson, 964 F.2d 706, 711 (7th Cir. 1992)* (observing that respondent had refused to answer the petition to compel arbitration that was filed in state court or join the petition of other Retrocessionaires to remove state proceedings to federal court). Moreover, respondent's stake in the outcome was low. Respondent's share of the risk translated to liability of roughly $ 181,000, or 2.3% of the total award. If petitioner assumed that respondent had elected to let the other Retrocessionaires represent its interests, it made a reasonable assumption.

Although it is disputed whether respondent had actual notice of the arbitration, this disputed fact has no effect. At the bottom line, 1) respondent bound itself to treaties containing an arbitration clause drafted in favor of petitioner; 2) custom holds that petitioner need only inform the lead Retrocessionaire of matters relating to the operation of the treaties; and 3) respondent effectively received notice of the arbitration when its designated agent was given notice that respondent was being sued in state court to compel such

arbitration. Respondent cannot complain to petitioner that the other Retrocessionaires or its designated agent failed to notify it of the arbitration. Petitioner's notification efforts were reasonable.

C. Confirmation of Award

In its reply brief in support of the motion to vacate the award, respondent raises new arguments relating to the merits of the award that I have construed as its objections to confirmation of the award. I conclude that they are without merit.

In addition to the base award of $ 181.319, the arbitration panel assessed three sanctions should the award not be satisfied in forty-five days: one, interest at a annual rate of 7.5%; two, a joint and several liability to pay petitioner's attorney fees of $ 930,730; and three, the obligation to procure a $ 9,000,000 letter of credit in favor of petitioner. Petitioner seeks to have the award confirmed in full. Respondent contends that confirmation of the award including the additional elements is "unjust and inequitable." See Resp't Br. in Reply, dkt. # 18, at 17-19.

With respect to the interest sanction, respondent contends that it should be entitled to the forty-five day grace period because its "failure to make timely payment was solely due to Wausau's failure to properly serve and give notice to Banco." Id. at 18. This contention presupposes that petitioner breached its duty to give notice of the arbitration. It is clear that petitioner met its obligation.

Second, respondent complains that it should not have to pay attorney fees amounting to more than five times its share of actual damages. But respondent has provided no factual support for the proposition that its fellow Retrocessionaires have failed to pay the $ 930,730 and that

this award actually remains unsatisfied. Indeed, even if respondent will be forced to pay the full amount, it has a remedy; respondent may file suit against the other Retrocessionaires to collect the amount unfairly apportioned to it.

Last, respondent complains that petitioner has not explained to this court the need for the letter of credit. Clearly, the necessity for the letter of credit was a matter addressed at arbitration. Having failed to participate, respondent cannot question the conclusions of the panel.

D. Application of Inter-American Convention

I have applied the Inter-American Convention in this matter because the parties agree that it is applicable. However, one reservation to the United States' adoption of the treaty recognizes that parties to an international arbitration agreement may be citizens of nations that are signatories of both the Inter-American Convention and the New York Convention. In such circumstances, unless the arbitration agreement states which treaty applies, the reservation holds that Inter-American Convention should be applied only if a *majority* of the parties are citizens of nations that are signatories of the Inter-American Convention. See *9 U.S.C. § 305.*

Although the United States and Uruguay are signatories of both treaties, petitioner and respondent have not provided information concerning the citizenship of the remaining Retrocessionaires. Hence, it is possible that the New York Convention is applicable in this matter. (The parties do not explain why they agree that the Inter-American Convention is applicable.) Nonetheless, the point appears to be technical. Because the two treaties are similar, applying the New York Convention instead of the Inter-

American Convention would be unlikely to affect the outcome.

ORDER

IT IS ORDERED that

1. The motion of respondent Banco Seguros del Estado to vacate the arbitral award in favor of petitioner Employers Insurance of Wausau is DENIED;

2. The motion of petitioner to confirm the award is GRANTED; and

3. The clerk of court is directed to enter judgment in favor of petitioner confirming the arbitral award and close the case.

Entered this 5th day of January, 1999.

BY THE COURT:

BARBARA B. CRABB
District Judge

APPENDIX M

Relevant Sections of the Federal Arbitration Act

9 U.S.C. § 9
§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

9 U.S.C. § 10
§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make

an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty f misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

9 U.S.C. § 11

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an

order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 USCS § 12

§ 12. Notice of motions to vacate or modify; service, stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

APPENDIX N

IN THE MATTER OF THE ARBITRATION BETWEEN	Before
EMPLOYERS INSURANCE OF WAUSAU,	William P. Condon (Neutral Umpire)
Claimant,	Bradford W.Mitchell (London – Party Arbitrator)
–against-	
CERTAIN LONDON COMPANIES AND UNDERWRITERS AT LLOYD'S, LONDON,	William W. Fox, Jr. (Wausau – Party Arbitrator)
Respondents.	

After full consideration of the arguments of the parties and their submissions, the Panel finds as follows:

That Employers of Wausau is entitled to receive from Respondents as full and final settlement for all Products Liability Bodily Injury losses arising from asbestos related claims under the following contracts the sum of $7,783,324, such amount to be distributed by contract as follows:

Treaty Year	Excess of Loss Retrocessional Agreement (First Layer)	Award First Layer	Excess of Loss Retrocessional Agreement (Second Layer)	Award Second Layer	Excess of Loss Retrocessional Agreement (Third Layer)	Award Third Layer	Total Award
7/1/66-67	U70319, C/N10679;	$739,416	U70320	$ 560,399		$	$
7/1/67-68	U70319, C/N10679, U72200;	669,366	U70320	474,783			
7/1/68-69	U70319, C/N10679, U75249;	568,183	U75250	482,566			
7/1/69-70	U76690, C/N10679;	521,483	U76691	490,349			
7/1/70-71	U76690, C/N17769, FTL000256;	459,216	60011	521,483			
7/1/71-72	U76690, C/N71244, FTL000780;	311,333	U71245	560,399	FTL000782	$233,500	
7/1/72-73	U76690, C/N71244, FTL001237;	342,466	U71245	599,316	60012	$249,066	
Total		$3,611,463		$3,689,295		$482,566	$7,783,324

Each reinsurer tendering its share under each of the above contracts shall receive a full and final release from Employers for all Products Bodily Injury losses arising from asbestos related claims under such contracts.

If such amounts are not tendered by London respondents, either individually or collectively, within 45 days of the date of this award, the Panel makes the following additional awards:

1) Interest from the date of this award at a compound annual rate of 7.5%;
2) Attorneys fees and costs of $930,730 for which London respondents are jointly and severally liable;
3) At the expiration of a period of 45 days following the date of this award, London respondents shall provide a Letter of Credit to Employers of Wausau in the amount of $9,000,000 in a form acceptable to the Wisconsin Insurance Department and to secure payment of the ultimate liability in this matter.

The foregoing award is entered this 18th day of September, 1995 by a unanimous decision of the Panel.

/s/ William P. Condon
William P. Condon
(Neutral Umpire)

/s/ Bradford W. Mitchell
Bradford W. Mitchell
(London – Party Arbitrator)

/s/ William W. Fox, Jr.
William W. Fox, Jr.
(Wausau – Party Arbitrator)

APPENDIX O

Jorge W. Moreira, Esq. (2508)
The Moreira Law Firm, P.C.
130 W. 42nd Street, Suite 501
New York, NY 10036
Attorneys for Plaintiff Banco de Seguros del Estado

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Banco de Seguros del Estado, Plaintiff,	Civil Action No. 01 CV 5995
vs.	COMPLAINT FOR DECLARATORY RELIEF
Employers Insurance of Wausau, Defendant.	

Plaintiff, by its undersigned attorneys, alleges:

Nature of Action

1. This is an action for a declaratory judgment pursuant to 28 U.S.C. secs. 2201 and 2202, for the purpose of determining a question of actual controversy between the parties and for a permanent injunction.

Parties, Jurisdiction and Venue

2. Plaintiff, Banco de Seguros del Estado (hereinafter "Banco") is a corporation engaged in the business of insurance and reinsurance which is incorporated

under the laws of the Republic of Uruguay and has its principal place of business in Montevideo, Uruguay.

3. Banco is wholly owned by the government of Uruguay and, as such is an instrumentality of a foreign state pursuant to the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. sec. 1603 and a foreign state for purposes of determining diversity jurisdiction pursuant to 28 U.S.C. sec. 1332(a)(4).

4. Defendant Employers Insurance of Wausau (hereinafter "Wausau") is a mutual insurance company, organized under the laws of the State of Wisconsin and has its principal place of business in Wausau, Wisconsin.

5. As shown further below, the amount in controversy exceeds $75,000.00.

6. Accordingly, this Court has jurisdiction based on diversity of citizenship, pursuant to 28 U.S.C. sec. 1332(a)(4), because the jurisdictional amount is exceeded and this action is between a foreign state and a citizen of a State.

7. This Court is a proper venue for this action, pursuant to 28 U.S.C. sec. 1391, because, as shown further below, a substantial part of the events or omissions giving rise to this claim occurred in the State of New York, the state where this Court is located

Nature of Dispute

8. Wausau has docketed a money judgment transcript in the County of New York, in favor of Wausau and against Banco, which is facially inaccurate and for an amount6 that far exceeds Banco's obligations on the judgment underlying the transcript. The underlying

judgment confirmed an arbitration award which is ambiguous and which has been satisfied in part.

9. Wausau has commenced enforcement proceedings, based on the docketed transcript, under the laws of the State of New York, and has issued restraining orders and subpoenas to innocent third parties on the signature of its attorneys.

10. Banco seeks construction of the judgment/ arbitration award, a determination of its obligations under the judgment, an order vacating the transcript of judgment filed in New York and all restraining orders and information subpoenas issued thereunder and an order enjoining any further enforcement of the judgment until Banco's obligations have been fixed by the Court and only to the extent of Banco's liability as fixed by the Court.

Factual Background

8. [sic] Wausau docketed a transcript of judgment with the office of the Clerk of the County of New York, State of New York, on or about April 12, 2001. *See* copy of transcript of judgment annexed hereto as Exhibit A.

9. The only judgment outstanding against Banco and in favor of Wausau was rendered by the United States District Court for the Western District of Wisconsin on or about January 5, 1999 (hereinafter the "District Court Judgment"), confirming an arbitration award. *See* copy of the District Court Judgment annexed hereto as Exhibit B.

9. [sic] The transcript of judgment filed by Wausau incorrectly states that the underlying judgment was rendered by the District Court in the County of New York. *See* Exhibits A and B.

10. The transcript of judgment incorrectly states that the underlying judgment was a money judgment in the amount of $8,714,054.01. *See* Exhibit A.

11. In fact, the District Court Judgment stated, in relevant part, as follows:

> IT IS ORDERED AND ADJUDGED that the motion of petitioner Employers Insurance of Wausau to confirm the arbitration award against respondent Banco [de] Seguros del Estado is GRANTED. Judgment is entered in favor of petitioner confirming the arbitral award and this case is CLOSED.

12. The arbitration award confirmed by the District Court Judgment was entered on or about September 18, 1995 (the "Arbitration Award"), and provided, in relevant part, as follows;

> That Employers of Wausau is entitled to receive from Respondents as full and final settlement for all Products Liability Bodily Injury losses arising from asbestos related claims under the following contracts the sum of $7,783,324, such amount to be distributed by contract as follows:
>
> . . .
>
> If such amounts are not tendered by London respondents, either individually or collectively, within 45 days of the date of this award, the Panel makes the following additional awards:
> 1. Interest from the date of this award at a compound annual rate of 7.5%;

2. Attorneys fees and costs of $930,730 for which London respondents are jointly and severally liable;
3. At the expiration of a period of 45 days following the date of this award, London respondents shall provide a Letter of Credit ... in the amount of $9,000,000 ... to secure payment of the ultimate liability in this matter.

13. Upon information and belief, Wausau has received payment on the Arbitration Award from all respondents other than Banco.

14. The arbitrators' money award, of $7,783,324, was allocated by the specific contracts at issue. Subsequently, throughout extensive litigation on this matter, the parties have not disputed that Banco's share of the foregoing award is the amount of $181,319. The award was not made as a joint and several liability of all respondents. Accordingly, only the amount allocated to Banco should become part of any money judgment against Banco.

15. Under the plain language of the award, any money judgment against Banco should be calculated to include $181,319 in allocated damages, interest at 7.5% (compounded annually from September 18, 1995 to January 5, 1999 (the date the judgment was entered)), $930,730 in attorneys fees (the only part of the award that specifically provided for joint and several liability), plus post-judgment interest at an appropriate statutory rate. *See* Exhibit C.

16. Banco owes less than $1,500,000 on the District Office Judgment, including post-judgment interest at an appropriate statutory rate (subject to a determination of the proper interest calculation) and nowhere near the over $8,7000,000 [sic] claimed by Wausau.

17. Wausau, instead, has docketed a transcript of the District Office Judgment in the County of New York, as if it were a simple money judgment for over $8,700,000.

18. The direction of the arbitrators, confirmed by the District office Judgment, to post the Letter of Credit is in the nature of an injunction and not part of a money judgment.

19. In addition, since the Letter of Credit was intended to secure the "ultimate liability in this matter" from all the respondents named in the arbitration award and all liabilities have been discharged except for Banco's, the $9,000,000 letter of credit is far in excess of any amount needed to secure Banco's "ultimate" liability. Nor, did the direction to post a Letter of Credit include the "jointly and severally" language used in the case of the award of attorneys fees, indicating that the intent of the arbitrators was for Banco to post a portion of the Letter of Credit to cover its own liabilities, not the full $9,000,000.

20. The direction to post a Letter of Credit should be reasonably construed, or in the alternative and in the interest of fairness, reformed to provide for a lesser amount to reasonably secure Banco's liability.

21. If Banco's liability were properly fixed, the Letter of Credit requirement could be mooted because Banco would have the opportunity to satisfy the judgment and there would be no further liabilities.

22. As it stands, Banco cannot satisfy the judgment because it would not receive a discharge without paying over six times its liability under the District Office Judgment.

23. Wausau has proceeded on the basis of the transcript of judgment and under cover of the laws of the State of New York to issue restraining notices and information subpoenas to innocent third parties. *See* copies of Restraining Notice and Information Subpoena annexed hereto respectively as Exhibits D and E.

24. Wausau has added to the confusion by stating on the face of the Restraining Notice that in addition to over $8,700,000, "interest thereon at a compound annual rate of 7.5% from September 18, 1995 remains due and unpaid." The foregoing claim of interest is an error; any such interest should be included in the amount of the money judgment, up to the date of entry, January 5, 1000, and the only additional interest claimed should be post-judgment interest at an appropriate statutory rate for the applicable jurisdiction and not compounded. *See* Exhibit .

25. With all the confusion and error and Wausau's obstinacy in proceeding with enforcement proceedings to collect the exorbitant amount it claims, it is not possible to reasonably fix and discharge Banco's liability without the intervention of the Court.

26. Banco has attempted to negotiate with Wausau and reach an appropriate determination of its liability under the judgment and a settlement of this matter but to no avail.

Propriety of Declaration

27. A valid case and controversy exists sufficient for this Court to declare the rights and remedies of the parties in that the Arbitration Award confirmed by the District Court Judgment is ambiguous and Wausau will continue to attempt to obtain a windfall by seeking, through enforcement proceedings under cover of New York State law or other state and federal law, to collect a sum on the District Office Judgment far in excess of Banco's liability thereunder.

28. The plaintiff, Banco, has standing to request this declaration because it directly concerns a question of the amount and extent of its liability under the District Court Judgment and further, improper enforcement proceedings by Wausau against Banco will damage Banco's business reputation and impede any planned business operations or relationships in New York and other states. In addition, Wausau could conceivably reap a windfall and collect amounts far in excess of the amounts rightfully due to Wausau under the judgment.

29. This controversy is ripe for determination at this time because although Wausau has not yet collected on the District Court Judgment, it has already filed a false, incorrect transcript of the District Court Judgment in New York County where it is a present lien against Banco and, under the authority of its attorneys as officers of the courts of the State of New York, has already begun to issue restraining orders and information subpoenas in enforcement of the District Court Judgment. If relief is not granted, these collection proceedings will continue to damage the business

reputation of Banco and interfere and obstruct Banco's any future business operations in the State of New York, and possibly other states. In addition, Wausau could succeed in making an excessive recovery. Further, Banco's liability is exposed to post-judgment interest and unless the liability is reasonably fixed, exorbitant claims of interest will continue to accrue.

Propriety of Awarding Costs

30. Wausau has filed a false and erroneous transcript of judgment and despite good sense and the plain language of the District Court Judgment and Arbitration Award frivolously claims an amount almost six times that to which it is entitled. Accordingly, the Court should award Banco the cost of bringing this lawsuit, including reasonable attorneys fees, because this lawsuit should have been entirely unnecessary but for Wausau's stubbornness and unreasonableness.

Prayer for Relief

For all the reasons set forth above, plaintiff demands that this Court:

1. Issue a declaratory judgment construing the District Court Judgment and the Arbitration Award and fixing the amount of plaintiff Banco's liability thereunder to defendant Wausau.

2. Issue an Order:

a. Vacating the transcript of judgment and any restraining orders and information subpoenas filed or served thereunder by defendant Wausau in the County of New York, State of New York;

b. Enjoining permanently any further enforcement of the District Court Judgment except and until Banco's actual liability thereunder has been determined and then only for amounts or to the extent of Banco's liability as determined by this Court.

3. Award plaintiff Banco the costs of this suit, including reasonable attorneys fees.

4. Grant to plaintiff such other and further relief as the Court deems just, equitable and proper.

Dated: New York, New York
June 26, 2001

THE MOREIRA LAW FIRM, P.C.

By: /s/ Jorge W. Moreira
Jorge W. Moreira, Esq. 2508
Attorneys for Plaintiff Banco de
Seguros del Estado